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SOME QUESTIONS UNDER S. 20 OF THE LIMITATION ACT.

Referring to the provisions in S. 21 of the Limitation Act in respect of 'joint contractors, partners, executors or mortgagees', Dr. Mitra observes that these particular cases are specifically mentioned, probably as cases 'in which the act of one of a set of persons is *likely* to be considered as the act of the others', and he proceeds to point out that this express mention of some does not justify an 'implication' to the contrary in *other* cases of plural liability but that each case must be decided with reference to the language of Ss. 19 and 20. Simple as this may seem, the practical application of the rule enacted by these sections is by no means free from difficulty. To take but an instance or two, it was held in *Gopal* v. *Gopal* [1] followed by Abdur Rahim, J. in *Srinivasa* v. *Echammal* [2] and by Seshagiri Aiyar, J. in *Kothandarama* v. *Shanmugam* [3] that payment by the principal debtor would not prevent time running against the surety; but this is inconsistent with the decision of the court of Appeal in England in *Allison* v. *Frisby* [4] and it is evident that the learned Judges who decided *Velayutham* v. *Vythilingam* [5] were not quite satisfied as to the correctness of the view taken in *Srinivasa* v. *Echammall* [2]. Again, in *Newbould* v. *Smith* [6] the court of Appeal (composed of Cotton, Lindley and Lopes, L. JJ.) held that a payment by a mortgagor *after* he had assigned the mortgaged property to a third party, (subject to the incumbrance) was insufficient to keep alive the mortgagee's claim as against the property in the hands of the third party; but there is an apparent inconsistency between this view and the decision of the House of Lords in *Chinnery* v. *Evans* [7]; and in *Domi Lal Sahu* v. *Rosham Dobay* [8] Maclean, C. J. and Holmwood, J. declined to follow *Newbould* v. *Smith* [6], in view of what they considered to be the clear effect of the language of S. 20 of the

1. (1903) I. L. R. 28 B. 248.
2. (1911) 21 M. L. J. 455.
3. (1915) 32 I. C. 608.
4. (1889) L. R. 43 Ch. D. 106.
5. (1912) 24 M. L. J. 66.
6. (1886) L. R. 33 Ch. D. 127.
7. (1864.) 11 H. L. C. 115
8. (1906) I. L. R. 33 C. 1278.

Indian Limitation Act. The course of decisions both in England and in India (even apart from the few cases already mentioned) bears testimony to the uncertainty of the law under this head; and it may therefore be useful to consider at some length the effect of the application of S. 20, particularly to certain cases of frequent occurrence like those of principal and surety, mortgagor and his assignee, the coheirs of a debtor etc.

It was pointed out in *Roddam* v. *Morley* [1] that the difficulty in the interpretation of the law in England was to some extent due to the fact that the framers of the English statute then under consideration 'had in their mind the single case of a sole obligor and that the case of a bond with several obligors or of a deceased obligor never occurred to them'. The Indian Legislature had not even that excuse—at any rate when framing the Act of 1877—for S. 21 shows that the case was present to their mind, and yet the language of the Indian Acts, as to the effect of part payment and payment of interest, is calculated to give rise to many of the doubts and difficulties which arose upon the construction of the English statute.

In view of some remarks of Seshagiri Iyer, J. in *Kothandarama* v. *Shanmugam* [2] it is necessary to draw attention to the difference between 'acknowledgments' and 'payments', in their respective effect upon the running of time. While S. 19 makes an acknowledgment effective only if made by the party against whom such property or right is claimed *i. e.*, by the person sued (or his predecessor in title), S. 20 only requires that interest should be paid 'by the person liable to pay the debt' and that part payment should be 'by the debtor' and, as will be presently shown, this need not always be the person sued (or his predecessor in title). (Cf. *Venkatakrishniah* v. *Subbarayudu* [3].)

It has sometimes been suggested—apparently on the analogy of the interpretation placed on S. 7 of Act XV of 1877, in *Seshan* v. *Rajagopala* [4] and *Vigneswara* v. *Bapayya* [5]—that where there are several persons liable (in one way or another) for a debt, a payment, to come under S. 20, must be made by or on behalf of *all* of them; but such a construction of S. 20 is opposed to the whole course of decisions in England on the corresponding

1. (1857) 1 De G. & J. 1.
2. (1915) 32 I. C. 608.
3. (1916) 3 L. W. 576.
4. (1890) I. L. R. 13 M. 236.
5. (1893) I. L. R. 16 M. 436.

provisions in the English Limitation Acts and was expressly disapproved of in *Velayuthâm* v. *Vythilingam* [1]. See also, *Hem Chandra Chaudhuri* v. *Purna Chandra Chaudhuri* [2].

In view of the opinion sometimes expressed as the reason for not following English precedents, that the principles of law and the language of the statute with reference to which those cases were decided are different from those governing us here, it is both necessary and desirable briefly to advert here to the law on the subject in England. A comparison of the changes made from time to time in the language of the Indian Limitation Acts with the course of judicial decisions in England will, it is submitted, clearly show that far from enacting a different rule, the Indian Legislature intended to adopt the view indicated by the English decisions of the time.

The state of the law in England prior to 1833, does not require any lengthy notice here. It is sufficient to say that prior to 1833, there was no *statutory rule* of limitation, in England, in respect of suits to recover money 'charged on land', and payment of interest or part payment of principal came to be relied on only as a means of rebutting the presumption of discharge arising from lapse of time. Even in cases governed by the early Statute of 21 Jac. I. C. 16, the rule as to part payment or payment of interest rested only on case law for a long time; but the rule of those days that such payment operates by way of a 'fresh promise' to pay what remains due has little significance after the introduction of statutory provisions on the point.

In putting the rule as to acknowledgments, part payments and payment of principal on a statutory basis, one of the statutes of 1833 (3 and 4 Wm. 4 C. 27 S. 40) used the following language:—' unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing *signed by the person by whom the same shall be payable* or his agent' (cf. 37 and 38 Vic. C. 57 S. 8); S. 42 of the same Act (dealing with suits for arrears of rent or interest) referred to an acknowledgment * * * * 'signed by the person by whom the same was payable or his agent.' 'Another Act (3 and 4 Wm. 4 C. 42 S. 5) referred to an acknowledgment * * either by writing signed by the party liable by virtue of such indenture etc. or by part payment or

1. (1912) 24 M. L. J. 66. 2. (1914) 22 I. C. 510.

part satisfaction on account of any principal or interest being then due thereon etc.' There was no rule in England, prior to 1828 (as regards acknowledgments) and 1856 (as regards payment of interest or part payment of principal) corresponding to the exception known to the later law in respect of joint contractors etc., so that up to 1856, the law was that 'payment of interest or part payment, by one of several contractors, during the life of all, took the case out of the statute against the rest.' Even the provision introduced in 1856 (by the Mercantile Law Amendment Act) did not apply to partners nor to cases falling within S. 40 of 3 and 4 Wm. 4 C. 27 and (therefore) within S. 8 of 37 and 38 Vic. C. 57.

It may be noticed that the Indian statute (Act 14) of 1859 following the above statutes (except that the reference to 'agents' was omitted) recognised an acknowledgment in writing signed 'by the person who but for the law of limitation would be liable to pay the same.' The rule as to saving of limitation by part payment or payment of interest was considered by Sir B. Peacock unsuited to India and was therefore altogether omitted. On the English Statutes of 1833, two questions arose, (i) whether the words by the 'person by whom the same shall be payable' referred only to 'acknowledgments' or also to payments (towards interest or principal), (ii) when there are more persons than one liable, what is the effect of (*a*) an acknowledgment by one of them and (*b*) a payment by one of them, as against the rest, do far as limitation is concerned. It is important to note the secisions in England on these points, between 1859 and 1871 as that will enable us to realise the significance of the words employed in the Indian Limitation Act of 1871. On the first of these questions, judicial opinion in England was divided (cf. per Lords Westbury and Cranworth in *Chinnery* v. *Evans* [1]); but it was nevertheless recognised that as a matter of principle (if not by force of the language of the Statute) a payment by a stranger was not a payment within the intendment of the Statute, and the payment must therefore be *by a person liable to pay.* As to the second question, it is necessary to compare *Roddam* v. *Morley* [2], (a case as to part payment) decided by Lord Cranworth (with the advice of two Judges) in 1857 with *Bolding* v. *Lane* [3], (a case as to acknowledgments) decided by Lord Westbury in 1863. In the former case, a devisee for life had paid interest on a specialty

1. (1864) 11 H. L. C. 115. 2. (1857) 1 De G. & J. 1.
3. (1863) 1 De. G. J. & S. 122.

debt of his testator's and it was held (with reference to 3 and 4 William 4 C. 42, S. 5 quoted *supra*) that this sufficed to keep the creditor's right of action alive against *all parties* interested in remainder. Two points were involved in that decision (i) that though the devisee for life was not liable to the testator's creditor as a party to the contract (or by privity) he was nevertheless a 'party liable' within the meaning of the section inasmuch as he can be proceeded against (to the extent of assets) for the recovery of the debt. and (ii) that a payment within the section sets the action free *generally and not merely against the person paying* or his legal representative. The Lord Chancellor observed that in cases where there may be several persons liable, 'it never could have been contemplated that in order to prevent the operation of the statutory bar there must always be an actual payment by all the persons liable.' In *Bolding* v. *Lane* [1], (where the question had to be decided with reference to 3 and 4 Wm. 4 C. 27 S. 42 quoted *supra*) it was held that an *acknowledgment* by a mortgagor (in respect of arrears of interest due to a prior mortgagee) will not avail to save limitation as against a puisne mortgagee. The principle of the decision, as explained by Lord Westbury himself in the later case of *Chinnery* v. *Evans* [2], was, that while the words 'by whom the same is payable' are words of 'large import' so as to include the mortgagor and also the other mortgagees by whom the prior charge was payable, the effect of an acknowledgment by one of them should be confined to the interest of the individual giving the acknowledgment; for otherwise 'the mortgagor or his representative who may have no interest whatever in the lands (for the ultimate equity of redemption may not be worth one shilling) shall be enabled to charge that estate anew with any amount of arrears of interest as against the second and subsequent mortgagees.' Then came *Chinnery* v. *Evans* [2], in which the House of Lords held that payment of interest by an agent of the mortgagor would suffice to keep the mortgagee's remedy alive even as against assignees of the mortgaged property.

Viewed in the light of the above cases, the contrast in language between Ss. 20 and 21 of the Indian Limitation Act (9) of 1871 is significant, as also the difference as regards acknowledgments between the language of the Act of 1859 and that of the Act of 1871. The general language in Act 14 of 59 as to

1. (1863) 1 De. G. J. & S. 122. 2. (1864) 11 H. L. C. 115.

acknowledgment by 'the person who would be liable to pay' was changed so as to restrict the operation of an acknowledgment to 'the party to be charged therewith' so as to bring the law in line with the decision in *Bolding* v. *Lane* [1]. The next section as to saving of limitation by payment (which was for the first time introduced in 1871) adopts the wide language of the English cases, *i. e.* 'by the debtor' or 'by the person liable to pay the debt' and in the words of Lord Cranworth in *Roddam* v. *Morley* [2], the section 'does not confine his (the creditor's) right to a right of action against the person who has made the payment.' Nor does it say in respect of 'what action' limitation is saved by the payment, but provides generally for a new period of limitation 'according to the nature of the original liability.' It may be noted, in passing, that even these words 'according to the nature of the original liability' have been omitted in the Act of 1908. These considerations seem to justify the view that the law in India was meant to be the same as declared in England by *Bolding* v. *Lane* [1], and *Roddam* v. *Morley* [2], and that payments of interest and part payments were intended to have a wider operation than mere acknowledgments. See *Venkatakrishniah* v. *Subbarayudu* [3]. The following observations of Lord Hobhouse in *Lewin* v. *Wilson* [4], though made with reference to a foreign Statute, are so apposite in this connection that we make no apology for quoting them :—

"As regards the person making them, acknowledgment may, as pointed out in *Bolding* v. *Lane* [1], be made by a person who, though a party to the mortgage contract has ceased to have any substantial interest in it and has nothing to lose by the acknowledgment; whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If therefore we find that the legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it."

1. (1863) 1 De. G.J. & S. 122.
2. (1857) 1 De. G. & J. 1.
3. (1916) 3 L. W. 576.
4. (1886) L. R. 11 A. C. 639.

It only remains to add that in recasting the section relating to acknowledgment in 1877 and 1908 and extending it to all rights (not merely debts or legacies) the principle of restricted operation is preserved by the use of the words 'party against whom such property or right is claimed' while in the case of 'payments' there is no indication (by any change of language) to exclude the logical developments of the rule in England. To complete the comparison, we may point out that the doctrine of agency (in the making of acknowledgments and payments) is allowed only restricted scope in India by requiring that the agent should be one 'duly authorised in this behalf' or (in the words of the Act of (1871)) 'generally or specially authorised in this behalf.' Some of the English decisions which rest on a rather liberal application of the theory of 'implied agency' will not to that extent be safe precedents in this country.

Principal and Surety.

In *Allison* v. *Frisby* [1], stress is laid by both Cotton and Fry, L. JJ. on the circumstance that S. (8) of the Real Property Limitation Act of 1874, dealing with payment of 'interest' etc., 'says nothing about the person by whom the money is paid'; and this is evidently what Jenkins, C. J. meant when he said in *Gopal* v. *Gopal* [2], that that case turned upon the construction of the particular statute. But, as against this, it has to be observed that other eminent Judges in England have, even as a matter of construction of the section, held that the words 'by the person by whom the same shall be payable' apply both to acknowledgments and to part payments. Lord Justice Cotton himself proceeds to say that the rule is satisfied 'if the payment is made by any one liable to pay'—the same language as in the Indian Act—and it is on this footing that that learned Judge holds that 'payment by either principal or surety takes the case out of the statute against both.' Jenkins, C. J. in *Gopal* v. *Gopal* [2], takes a different view, on the ground that the debt of the principal is different from that of the surety, that neither is liable to pay the debt of the *other* and that accordingly payment in respect of the one debt cannot be considered to be payment in respect of the other debt. The learned Chief Justice is of course right when he points out that there is a recognition of the difference between the respective liabilities of the two in the observations of Kay, J. and Bowen, L. J. in *Allison* v. *Frisby* [1], itself

1. (1889) L. R. 43 Ch. D. 106. 2. (1903) I.L.R. 28 B. 248.

and in the decision in *In re Powers, Lindsell* v. *Phillips* [1]. But we venture to doubt if those cases support the distinction in the sense in which and to the extent to which he seeks to use it. They held that where there is a suretyship in respect of a mortgage debt of another, the surety's liability does not itself become a liability 'charged on land' so as to bring the case within the 12 years' rule laid down by S. 8 of the Real Property Limitation Act of 1874. But in spite of the recognition of the distinction (whatever it may be) between the liabilities of the two, all the Judges of the Court of Appeal in England were able to hold that payment by one was sufficient to save limitation as against the other as well.

It must also be admitted that there is great force in the observation of Fry, L.J. in *Allison* v. *Frisby* [2], that it is usual for the principal debtor and not the surety to pay the interest and 'it would be contrary to good sense and the common understanding of mankind that while he is doing so, the statute should run in favour of the surety unless he makes a payment or gives an acknowledgment.' Is there then sufficient in the language of the Indian Statute law to preclude a similar view being adopted in this country? S. 20 of the Limitation Act speaks of a payment 'by the debtor' or 'by the person liable to pay the debt.' 'This of course implies that the debt must be *the one* which it is sought to enforce by the suit'; but can it be said that a suit against the surety is not one to enforce payment of the principal debt? The surety is under no liability except on the basis and to the extent of that of the principal; the contract itself is (in the terms of S. 126 of the Contract Act) to discharge the liability of the principal; and unless words are to be taken in a very narrow sense, in which case no man's liability can be said to be *identical* with that of another man, it is difficult to see anything unreasonable in holding that the 'debt' is the same as regards both principal and surety. The decision in *Sreenivasa* v. *Echammal* [3], merely follows *Gopal* v. *Gopal* [4], and does not carry the argument any further.

The decision in *Cockrill* v. *Sparkes* [5], referred to in *Gopal* v. *Gopal* [4], suggests another line of argument (though the Bombay Judges do not adopt it). It was there held that a part payment

1. (1885) L. R. 30 Ch. D. 291.
2. (1889) L. R. 43 Ch. D. 106.
3. (1910) 21 M. L. J. 455.
4. (1903) I. L. R. 28 B. 248.
5. (1863) 1 H. & C. 699.

by the principal debtor would not prevent the running of time as against the surety, because of the provisions of the Mercantile Law Amendment Act (corresponding to Cl. 2 of S. 21 of Act IX of 1908) relating to joint contractors etc. It is suggested by the learned Judges who decided *Velayuthan* v. *Vythilingam* [1] that the decision in *Gopal* v. *Gopal* [2] may perhaps be supported on this ground and the question was decided by Seshagiri Aiyar, J. in *Kothandarama* v. *Shanmugam* [3], on this very ground. This argument was also pressed in *Allison* v. *Frisby* [4]; Cotton, L. J. met it by saying that S. 14 of the Mercantile Law Amendment Act did not (as already pointed out) apply to cases falling under S. 8 of the Real Property Limitation Act, 1874 or the corresponding S. (40) of 3 and 4 William IV C. 27; the other two Lords Justices do not refer to the point. This does not necessarily show that the contention is sound in other cases; indeed the distinction thus made shows that the learned Judges did not regard the rule as merely illustrative of a general principle. In view of the observations of Cotton, L. J. himself in *In re Powers* [5], it is doubtful if *Cockrill* v. *Sparkes* [6] can be applied to cases of suretyship properly so called. The earlier case, he pointed out, was one "of a joint and several note by two persons, one of whom was in fact only a surety", *i. e.*, a case similar to the illustration to Sec. 132 of the Indian Contract Act; and in that view both the executants stand on the same footing, so far as the creditor is concerned. (The same was the case in *Kothandarama* v. *Shanmugam* [3]). But can that be said of an ordinary contract of suretyship where the conditions of the surety's liability to the creditor are essentially different from those attending the liability of the principal debtor. Can the mere fact that ordinarily, the liability of principal and surety is co-extensive make them 'joint contractors.' Seshagiri Aiyar, J. relied on Sec. 43 of the Contract Act, referring evidently to the explanation. But the context as well as illustration (d) clearly show that the provision has reference to the very class of cases provided for in S. 132. In any event, the argument cannot apply to cases in which the suretyship is subsequent *i. e.*, in respect of a pre-existing debt of another; for in that case the surety and the principal debtor can in no sense be described as 'joint contractors; and it will be anomalous that S. 20 of the Limitation

1. (1912) 24 M. L. J. 66.
2. (1903) I.L.R. 28 B. 248.
3. (1915) 32 I. C. 608.
4. (1889) L. R. 43 Ch. D. 106.
5. (1885) L.R 30 Ch. D. 291.
6. (1863) I.H. and C. 689.

UNIVERSITY DEPARTMENT OF LAW NOT TO BE REMOVED

Act should have one kind of operation when the contract of suretyship was contemporaneous with the creation of the principal debt and another, in cases where it came into existence subsequently.

In *Kothandarama* v. *Shanmugam* [1], Seshagiri Aiyar, J. takes a wider view. He holds that S. 21 (2) is merely illustrative of a general principle, that the enumeration therein is not exhaustive of the cases in which it is intended to protect a person from the consequences of acts not his own, so that, even if principal and surety cannot be brought under the description of 'joint contractors' (they cannot of course be brought in under any of the other classes specified there), the *principle* of the section will apply to their case as well—in fact, to all cases where there is a question of the liability of several persons and it is sought to extend time as against one of them on the strength of any act of another. The result of such a view may be substantially unexceptionable in the case of 'acknowledgments', but as a principle of construction of S. 21 (2), so as to apply it to 'part-payments' or 'payments of interest' as well, it is open to question; for the result, then, would be that a payment can never avail to save limitation except as against the person making it, (subject of course to the doctrine of agency, express or implied which is specifically recognised in S. 20). Such a position is not only inconsistent, as already observed, with the whole course of English case-law but fails to give any effect whatever to the difference in language between S. 19 and S. 20 as to the person by whom an 'acknowledgment' and 'payment' may be made. In view of the marked difference in language between 19 and 20 and of the principle explained in *Lewin* v. *Wilson* [2] the learned Judge's dictum that acknowledgments and payments stand on the same footing cannot be unreservedly accepted. The further remark that there is no provision in the English Law corresponding to S. 21 (2) evidently overlooks S. 14 of the Mercantile Law Amendment Act. In view of the broad proposition laid down by him as to the principle of Ss. 20 and 21, we must confess ourselves unable to follow his observation that cases like *Krishna Chandra* v. *Bhairab Chandra* [3] and *Domi Lal Sahu* v. *Rasham Dobay* [4] do not touch the question; for there a payment of

1. (1915) 32 I. C. 608.
2. (1886) L. R. 11 A C. 639.
3. (1905) I. L. R. 32 C. 1077.
4. (1906) I. L. R. 33 C. 1278.

interest by the mortgagor was held sufficient to save limitation even against the assignee without reference to any authority from or even the knowledge of the assignee as regards the payment. (See also *Hem Chandra Chaudhuri* v. *Purna Chandra Chaudhuri*[1]).

With reference to the argument that S. 21 (2) is merely an illustration or application of the general principle laid down as early as in Act XIV of 1859 (S. 4), that if more than one person be liable, none of them shall become chargeable by reason of a written acknowledgment signed by another, we have to point out that that enactment related only to 'acknowledgment' and not to part payment or payment of interest which was not recognised in the Act of 1859 as giving a fresh starting point for limitation and that in Act IX of 1871, by which the provision about part payment or payment of interest was first introduced in India, no exception was made to that rule in the case of joint contractors &c. As regards acknowledgment, the general proviso to S. 4 of Act XIV of 1859 gave place to a specific exception in the case of partners and executors.

(*To be continued.*)

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1. (1914) 22 I. C. 510.

SUMMARY OF ENGLISH CASES.

Jones *v.* **Jones and another** : (1916) 2 A. C. 481.

Slander—School-master—Words imputing moral misconduct—No Special damage—Words not spoken touching his calling.

Words imputing adultery to a school-master, in the absence of special damage, are not actionable as slander unless they were spoken touching or in the way of the school-master's calling. The fact that moral misconduct with a married woman cannot fail to be injurious to the office of school-master as to any other office will not make the imputation actionable slander.

Great Central Railway Company *v.* **Hewlett** : (1916) 2 A. C. 511.

Negligence—Obstruction in highway—Legislation by Statute—Lighting regulations during war—Obstruction not visible in a dark night—Accident.

Where a Railway Company was by a private Act of Parliament authorised to maintain certain gate posts which they had built before the passing of the Act, in the highway, and a cabman drove againt the gate posts and thereby sustained damage in a dark night by reason of the lights on the highway near the gate posts being dimmed by the lighting regulations due to war, the Railway Company was not liable for negligence, as they were not bound to do anything positively but merely to maintain the gate posts which had been built already.

Mahomed Syedol Ariffin *v.* **Yeoh Ooi Gark** : (1916) 2 A. C. 575.

Evidence—Straits Settlements Ordinance III of 1893, S. 32 sub-S. 5 and illustration (l)—Date of birth—Statement by the father of the date of birth—Construction of Statute—Illustration, repugnancy to the section.

A statement by a father stating the date of the birth of the son is admissible under S. 32 (5) and illustration (l) of the Evidence Ordinance, which corresponds to S. 32 (5) and illustration (l) of the Evidence Act. Illustrations appended to sections of a Statute should be accepted, if that can be done as being of relevance and value in construing the text; they should be rejected as repugnant to the section as the last result of construction.

British Union and National Insurance Co. *v.* Lawson: (1916) 2 Ch. 476. C. A.

Indemnity—Contract of—Assignability—Measure of liability of indemnified—Contract to indemnify insolvent-debtor—Effect.

A contract of indemnity is not a mere personal contract and is capable of assignment.

The measure of the liability of the indemnifier is not the capacity of the indemnified to pay, but his liability to pay.

In the case of an insolvent debtor a contract to indemnify him has the same result as a guarantee to the principal creditor of payment of the debt.

Schwann *v.* Cotton: (1916) 2 Ch. 459. C. A.

Easement—Continuous and apparent Easement—Devise of two properties with appurtenances—One property enjoying at time of devise water through pipe in other property—Water conducted from well on stranger's tenement—Implied grant of Easement —Servient tenement transferred to bona fide *purchaser for value without notice—Possibility of lawful interruption of water by stranger—Effect.*

Where the owner of two pieces of land A and B who enjoyed in respect of piece A, a supply of water by means of a pipe in piece B, devised them both to different persons together with the appurtenances, *held* that the effect of the will was to devise piece A with the right of passage of such water as might flow through the pipe and that the devise of piece B was a devise subject to that right. *Held* further that piece B would continue to be subject to the right even in the hands of a *bona fide* purchaser for value without notice. *Held* also that the right of the owner of piece A was in no way affected by the fact that the supply to the pipe might at any time be cut off by the lawful interference of a third person.

A grant by an upper proprietor to a lower of a right to the accustomed flow of water through an artificial water course is in no way affected by the fact that the supply might at any time be cut off by the lawful interference of a third person.

Per *Warrington, L. J.*—Where the right claimed by the several proprietors depends upon user only the precautious nature of the original supply may affect the user of all the owners and prevent the acquisition by mere user of any legal right to a continuance.

Pearce *v.* **Bulteel**: (1916) 2 Ch. 545.

Trustee—Conveyance to cestui que trust *on footing that trusts are fulfilled—Release by* cestui que trust*—Effect on trust—*Cestui que trust *himself one of the trustees—Conveyance of legal estate by beneficiary to* bona fide *transferee—Transferee not affected by prior equities under trust—*Bona fide *transferee from trustee—Trustee making fictitious title —Transferee not affected by trust of which he was not aware—Partnership—Agreement between partners for conversion of joint into separate estate, and* vice versa *when complete.*

If trustees convey to the *cestui que trust* upon the footing that the trusts are fulfilled, and the *cestui que trust* releases the trustees, the trusts are determined, and none the less because the beneficiary was one of the trustees. In such circumstances a *bona fide* purchaser getting the legal estate from the beneficiary is unaffected by prior equities arising under the instrument of trust.

If a trustee holding property under one instrument of trust makes a fictitious title under another, a purchaser, who knew that he was dealing with a trustee, could not be affected by equities arising under a trust by which he did not know his vendor to be in any way affected.

The statement in Lindley on Partnership, 8th Edition, pp. 400-1, that in order that an agreement among partners may have the effect of converting joint into separate estate, or *vice versa*, the agreement must be executed, and not be executory merely, does not mean that what has to be done under the agreement must be entirely completed, but that nothing remains to be done to make the agreement operative.

In re **Hawkins**: **White** *v.* **White**: (1916) 2 Ch. 570.

Will—Construction—Legacy given out of residue—Partial interest in legacy undisposed of—Effect.

Generally speaking, so far as a specific fund or a legacy is given out of or so as to diminish residue and some partial interest in such a legacy, whether of the nature of capital or of the nature of income is undisposed of, that interest remains as or fails to be subtracted from or results to residue so as to augment the capital or the income for the time being of the residue. In such a case there is nothing to change the character of the income or capital of the particular fund so left undisposed of.

In re **Helliwell Pickles *v.* Helliwell** : (1916) 2 Ch. 580.

Will—Construction—Use of word of relationship in a loose sense—Effect.—Gift to nephews and nieces and their children—Inclusion of children of illegitimate sisters.

By treating or naming definite individuals as relations who are not strictly such, and by thereby indicating that he is using a word of relationship in a wider or looser sense than its strict sense, a testator may include in a general gift to relations of that class not merely the specially named individuals, but other persons who are in a corresponding position.

Halsey *v.* Lowenfeld (1916) 2 K. B. 707 C. A.

Landlord and Tenant—Lease before war—Lessee an alien enemy after war—Suit against him for rent on covenant under lease—Maintainability—Assignment of lease by lessee with covenant of indemnity—Lessee if can enforce covenant by third party or otherwise.

A lease granted before the war to one who since the war became an alien enemy is not either suspended during the war or determined, and an action can be brought during the war to recover from the lessee rent due under the covenant in the lease.

Where such a lessee assigned the lease with a covenant of indemnity against his liability for the rent, held he could not during the war enforce his right to indemnity by a third party notice because for the purposes of such notice the lessee must be regarded as a plaintiff and the assignee as a defendant.

James Morrison & Co. Ltd. *v.* Shaw, Savill, and Albion Co., Ltd. (1916) 2 K. B. 783 C. A.

Bill of Lading—"Intermediate Port"—Meaning—Tests—Deviation from agreed voyage—Loss through King's Enemies—Liability of shipowner—Conditions.

It is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an "intermediate port" within the meaning of a bill of lading. In construing the document all the surrounding circumstances must be taken into consideration, the size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the parties in question. It is a question of fact in each case.

A shipowner, who breaks his contract of carriage by deviating from the voyage agreed upon, is liable for loss occurring even

through the King's enemies while the ship is on her deviating course, unless he can show that the loss or damage would have occurred if the ship had been on her proper course.

JOTTINGS AND CUTTINGS

Fusion :—THE demand for economy in the administration of the law has resulted in a resuscitation of the proposal for the amalgamation of the two branches of the profession. To the convincing reasons for opposing the proposal stated by MR. MELMOTH WALTERS may be added one important point emphasised by Lord Alverstone in his 'Recollections of Bar and Bench':—

> In my opinion the existence of a body of men who devote themselves solely to advocacy, and have little or nothing to do with the cases until they are brought to them for conduct in Court, has been of immense value to our English system of jurisprudence. The independence of the Bar, arising from the absence of any personal interest in the success of proceedings, has given them a position in public opinion which could not possibly be attained under any other system.

Mr. Melmoth Walters makes it clear that the members of the Law Society, though favourable to an increase in the facilities for transfer from one branch of the profession to the other, have been consistently opposed to fusion. The Bar has certainly shown no eagerness to welcome it, the only member of any eminence who has declared himself in favour of it being Sir Edward Clarke, who made a speech supporting it soon after his appointment as Solicitor-General in 1886. The weight of authority is, indeed, strongly against the proposal. Distinguished advocates who have had experience of both systems have recognised that the organic division of legal labour is advantageous. Mr. Benjamin, K. C., for instance, 'agreed'—so Lord Alverstone tells us—'that for a country with a long-established procedure, the English system was by far the best.' The extension of the jurisdiction of the County Courts—where, of course, Solicitors have a right of audience—constitutes, no doubt, a practical difficulty which eventually will have to be solved; but even here we cannot quite agree with Mr. Melmoth Walters that 'fusion' has practically come into existence. One of the great advantages of the present system is that litigants can easily enjoy the services of a specialist. Even in the County Courts the more important cases are not infrequently argued by barristers who

have specialised in particular branches of the law.—*The Law Journal, 2nd December 1916.*

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Lawyers in the New Ministry.—The number of lawyers in Mr. Lloyd George's Administration is larger than in Mr. Asquith's. This fact, so gratifying to the profession, seems to have escaped the attention of the acrimonious persons who were always complaining that the legal element in the old Ministry was too large. Eight lawyers hold positions of Cabinet rank in the new Administration, *viz.*, Mr. Lloyd George, Sir Robert Finlay, Lord Milner, Sir Edward Carson, Sir George Cave, Lord Robert Cecil, Mr. Duke, and Sir F. E. Smith. In the old Ministry there were seven. Mr. Asquith, Lord Buckmaster, and Mr. McKenna have ceased to be Ministers of the Crown ; while Mr. Lloyd George, Lord Robert Cecil, Mr. Duke, and Sir F. E. Smith, the other lawyers among Mr. Asquith's colleagues, remain. The four new lawyers in posts of Cabinet importance are Sir Robert Finlay, Sir Edward Carson, Sir George Cave and Lord Milner, who if not precisely a lawyer, is, like Mr. McKenna, a 'lawyer-like person,' since he was called to the Bar at the Inner Temple thirty-four years ago, and sought for some time to practise.—*The Law Journal, 16th December 1916.*

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The New Lord Chancellor.—The elevation of Sir Robert Finlay to the Woolsack has been regarded generally as a personal tribute to 'the father of the now practising Bar,' as the oldest and yet most active member of the profession has been called. But it is really much more than that, for the new Lord Chancellor is not only one of the most experienced of international jurists, but is also an expert *facile princeps* in all the varied constitutional and social systems of our colonies and dependencies. If it should be the good fortune of the present Government to bring about the peace which all desire, the head of the English judiciary will naturally take a great place in the discussion of the terms of settlement, and also in the re-arrangement of our relations with the Allied Powers and our own Dominions. In the ripe judgment and widely accepted authority of the new Lord Chancellor the country possesses a guarantee for a sound and enduring solution of these great problems.—*The Law Journal, 16th December 1916.*

The New Law Officers.—If, as we presume, Sir Frederick Smith had the opportunity of occupying a higher office in the Ministry, he has the satisfaction of knowing that both branches of the profession are pleased that he retains a position which he fills with marked ability and dignity. His large acquaintance with international law is of special value in the performance of the Attorney-General's duties at the present time. Sir George Cave, whose appointment as Home Secretary is a well-deserved recognition of his Parliamentary gifts, though his old colleagues at the Chancery Bar regret that his connection with the profession has become less intimate, is succeeded in the office of Solicitor-General by Mr. Gordon Hewart, K. C., M. P., who has achieved, at the comparatively early age of forty-six, a distinguished place at the Common Law Bar. Both the Woolsack and the two Law Officerships are again held by members of that Bar. Sir George Cave, who became Solicitor-General twelve months ago, was with the exception of Lord Buckmaster, the only Chancery lawyer who had been a Law Officer since Sir John Rigby ceased to be Attorney-General twenty-three years ago. In his appointment as Home Secretary, however, the Chancery Bar enjoys a new distinction. Though the Home Secretaryship has in recent years been held more often by a lawyer than a layman, Sir George Cave is the first Chancery lawyer to hold the office.—*The Law Journal, 16th December 1916.*

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The Late Sir Roland Vaughan Williams.—In the passing away of the venerable ex-Lord Justice who presided for so many years and with such notable vigour over Appeal Court II, there has gone one of the outstanding figures in English law. Heredity, which is more pronounced in the legal profession than in any other, was most marked in this son of a famous judge and descendant of the 'renowned Serjeant.' And the great reputation which he inherited he has handed on with enhanced value to his successors. A great master of the Common Law in which he was reared, he preserved in his work as a judge all the refinement, the subtlety, and the accuracy which distinguished the classic models of the old system. And he will long be remembered by the elaborate judgments enshrined in the Reports in which he worked out the transformation to the new order of things—for he was learned in equity, too—a pundit in both branches of the

law. For his own generation his memory will be kept green by the humanity of his methods, as well as the sanity of his judgments.—*The Law Journal, 16th December 1916.*

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The Etiquette of the Bar.—A member of the English Bar who makes an affidavit in a case in an English Court as to foreign law assumes the character of a witness and ought not, therefore, to hold a brief for any party to the proceeding.—*The Law Journal, 16th December 1916.*

CONTEMPORARY LEGAL LITERATURE.

In the *Harvard Law Review* for November, 1916, Mr. Jenks who as the Editor of the well-known Digest of Civil Law is peculiarly competent to express an opinion on the subject offers certain remarks on the general nature of the English Civil Law. He claims and rightly that his Digest is the best refutation of the obscurantist theory that the English Law is incapable of being stated in the form of simple rules or principles but he doubts whether the English Law is yet ripe for codification. Another lesson which he has learned from his labours in connection with the Digest is, he says, a realisation of the extraordinary inequalities which mark the different parts of the Civil Law of England. The English Law of Contract for example is scientific and complete while the English Law of real property though minute in some directions is incomplete in others and on the whole looks to an outsider, in the highest degree arbitrary. It is very poor in family law and the law of torts. To say that the law of trusts takes the place of family law is an inadequate explanation. English law is innocent of any substantive definition of tort. The characteristic feature of the English law of torts is the importance it attaches to acts as distinguished from omissions. Mr. Jenks suggests that it is due to the quasi-criminal character of the early remedies in tort. It is markedly visible in the comparative scantiness of the English law of negligence. Another characteristic of the English law is the preponderance of judge-made law over statute law, 2 to 1 being the proportion.

Another article of interest deals with State liability for tort. The writer shows the utter unsatisfactoriness of the common law rule "the king can do no wrong" especially

now when the state embarks upon many undertakings which private individuals used previously to carry on and suggests a statute making state liable in ordinary courts on all causes of action sounding in tort or in contract. Partial recognitions of this principle there have been by various statutes in America and effect has been given to it largely in the Dominions and in India. The writer is against the Continental system of separate courts for the trial of such causes of action. In another article, Mr. Weston questions the correctness of the rule laid down by the Massachusetts Court on the liability of promoters to the company for unfair sales of their property to the company. His argument is that the party entitled to sue in such cases is not the company but the subscribers who may have been deceived by their conduct. The very exceptions recognised by that court, *e.g.*, where the subscribers of the shares were the promoters themselves or when at any time the shares become vested in the promoters or when the promoters disclose the fact to the subscribers, show that the essence of the liability is deception practised on the subscribers.

To the University of Pennsylvania Law Review for November. Mr. Warren Seavey contributes an informing article on the subject of *notice through an agent*. The writer thus summarises the result of the cases:

1. Where one bases his rights upon the giving of notice to another, the notice must be given to one who at that time was authorised or held out as authorised to act for the other in the matter of the receiving of the notice. If this is done it is immaterial whether the agent was perpetrating a fraud on the principal unless this was known to the giver of the notice.

2. Where the right is based upon the possession of knowledge of another, some fault in that other or his agent must be shown. If the agent with knowledge is one through whose act the principal claims, the latter is bound irrespective of the method of the acquisition of the knowledge or of any unlawful frame of mind on the part of the agent. If the principal acquires title independently of the act of the agent with knowledge but the latter has an obligation to divulge or to act in reference to it, the principal is bound if the agent negligently or wilfully fails to perform his duty unless such failure was a consciously wrongful act. But even in the latter case as in all others, the principal is liable if he personally is at fault. Where

neither he nor his agent is at fault, there is no liability and no imputed knowledge. Conversely when the agent acts without knowledge a principal should be liable as though the agent had the knowledge when first absolute notice has been given, secondly where there is an obligation upon the principal to inform the agent or a duty upon the agent to inform himself from the records of his principal or otherwise.

Judicial Powers of interpretation under foreign Codes is the subject of another article in the same journal. The Swiss Code seems to confer the largest powers on the Court. The 1st article of that Code says that the written law governs all matters to which either the letter or the spirit of the Code apply. In the absence of a provision of law applicable to the case he is to decide according to custom and in the absence of custom according to the rule which he would establish if he were acting as a legislator. This provision is in part based on the French model. Art. 4 of the French Code provides that the Judge who refuses to render judgment under pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as guilty of denial of justice. Another rule of the French Code is that the judges may not render judgment in the form of general or regulative decrees of which the doctrine of *res judicata* is considered a species. Almost all the other codes which were more or less based upon French Code adopted the same rule (Spanish Code, art. 6, Chilian Code, arts. 3 and 24, Argentine Re-public Civil Code, S. 16). The German Code of 1900 omits all reference to any rules of interpretation or exposition possibly negativing the right of the Courts to do so.

The Law Journal, December 2, publishes a symposium of opinions of distinguished members of the law society on some interesting questions affecting law and the legal profession. One writer Mr. Dodd is in favour of many radical reforms, *e.g.*, he is for fusion of the two branches of the profession (another writer Mr. Walters is against it); for cutting off some, what he considers trivial causes of action, actions for breach of promise, libel and slander, for preventing cases from coming to Court at all by, for instance, substituting counsel's opinion for originating summons &c. Another writer (Mr. Richard King) discusses the advisability of admitting women to the legal profession. He has no objection to it though he is not enthusiastic about the prospects of their success in the profession. His inquiry in France seems to have brought him the information that ladies do

not generally shine in the profession, the only lady that was successful being a pretty woman whose success consisted in marrying a wealthy colleague in the profession. Mr. Brinsley Harper is for giving divorced ladies the new appellation of "legal widows".

BOOK REVIEWS.

THE JAINA LAW OF INHERITANCE AND PARTITION *by J. L. Jaini, M. A., Bar-at-Law.*

This attractive little book which forms one of the volumes in the Library of Jaina Literature published by the Central Jaina Publishing House, Arrah, is a translation (with the text) of a portion of what is claimed to be an important work of Jaina Law, the Bhadrabahu Samhita. The original (which is in Sanskrit) is substantially on the lines of the Hindu Metrical Smritis and the author is according to Jaina tradition said to have been a contemporary and preceptor of Chandragupta the Mauryan King. An extract from another legal work known as Indranandi Samhita is printed as Appendix A. In an interesting introductory note the translator (who is a Judge of the High Court at Indore) attempts to controvert the prevalent notion that the Jains have no law of their own and are, in the absence of special custom, governed by Hindu Law. (See also an elaborate discussion of the same point in a judgment delivered by the translator as Judge of the High Court which is printed as Appendix B.) But we cannot help saying that we are not much impressed with the answer that he gives to the question which he sets to himself: viz. after all, what is the practical loss to the Jains, if they are governed by the Hindu Law? And why should they have submitted to it for about a century if it was really repugnant to their instinct and to their religious and historical traditions? A perusal of the text of the book before us tends rather to confirm one in the belief that the Jain Law was substantially the same as the Hindu Law.

It may be interesting for instance to note that some of the verses at pages 36, 49 and 50 distinctly refer to Pindadana and one of them speaks of getting the inheritance and offering oblations as if they are closely connected matters. The verses relating to the adopted son also bear a close resemblance to the corresponding texts in the Hindu Law books except for the reference to 'affection' instead of religious utility. There are of course several provisions relating to other matters which are not identical with the present day rules of the Hindu Law, but it is

difficult to connect them with any peculiarity of Jainism and the difference is easily accounted for by the absence of the later stages of development known in the Hindu Law. The rules relating to exclusion from inheritance are also very similar to those of the Hindu Law. There are no doubt some marked differences in religious ideas between Hinduism and Jainism; but as to that the case law of the present day allows that such rules of the Hindu Law as are based on religious doctrines fundamentally inconsistent with Jainism are not to be applied to Jains.

THE LAWYER'S OFFICIAL DIARY, 1917—*The Lawyer's Companion Diary, 1917—Law Printing House, Madras.*

These diaries have been before the public for the last 5 years and their usefulness to the legal profession has been very great. As usual the diaries contain most of the legal information that a lawyer's clerk requires in his everyday life. We find that pages for the first three months of the year 1918 have been added to facilitate the recording of the engagements of the ensuing year. The get-up of the diaries is, as usual, excellent.

THE LAW OF WAR AND CONTRACT *by H. Campbell, Bar.-at-law, Bombay, published by the Oxford University Press, (Bombay and Madras) 1917.*

The present war has revived the study of a branch of law which ordinarily receives but little attention, *viz.*, that relating to the effect of war on Contracts; and the complexity of modern commercial and international life is such that even nations not directly connected with a war are nevertheless closely concerned with its effects on private contracts between subjects of the belligerent powers. In the course of the last year or two, several books have appeared, treating specially of this and cognate topics; and the handy little volume before us is a useful addition to that literature. The author must be congratulated upon the clear and simple way in which he has presented a somewhat unfamiliar subject. The facts connected with most of the important decisions noted are very fully stated and fairly copious extracts are given from the judgments, so that the book may not suffer in utility even in places where access cannot be had to a well furnished law library. The cases, including Indian decisions, have been brought down to November 1916.

'THE ADVOCATE.' HIS AIMS AND ASPIRATIONS; *by Cecil Walsh, M. A., K. C., Judge of the Allahabad High Court.*

A subject like the above is bound to be interesting and instructive when dealt with by one who has had experience of both sides—as they really are—of the administration of law, *viz.*, of the Bar and the Bench; and Mr. Justice Walsh has done a real service to the legal profession in India not merely by what he has said to his brethren at the Bar but also by what he has here and there suggested for the consideration of his brethren on the Bench. One cannot expect to find many new ideas in a book dealing with a subject that has been the theme of many a discourse in one form or another, but we have no doubt that the handy little work before us will amply repay perusal. We would specially commend to the attention of the younger members of the Bar, the chapters on 'Books to read' and 'Case-law and Case-worship and, for ourselves, we would gladly recognise the value of the remarks on reporting, in the latter chapter. Many of the suggestions in the course of the book and in Dr. Sundar Lal's supplemental chapter on the training of the Indian Vakil, deserve to be taken note of by the authorities responsible for the regulation of the Law Schools and Colleges in this country. To all members of the Bar, in this country, where we regret to say that the relations of the different branches of the profession and sometimes even the relations *inter se* of the members of each branch are not what they ought to be, we venture to commend the ideas in the chapter on '*Esprit de Corps.*'

PATNA LAW WEEKLY: *Published at Bankipore.*

We cordially welcome the new-comer and wish it a long career of vigorous and useful existence. With the creation of the new Patna High Court, it is no wonder that the need for a journal like this must have been keenly felt. A well conducted legal journal with the aims and ambitions set forth in the Foreword must, at least, be helpful in checking error, and stimulating thought, an achievement respectable enough but eventually may be able to realise its great ambition of "standing up for justice and upholding the great traditions associated with what may be called the Reign of Law." Naturally, the journal will contain comments on all matters falling within the province of law.

The Madras Law Journal.

PART VII.] FEBRUARY, 1917. [VOL. XXXII

TAVAZHI PROPERTY.

Tavazhi means Tayar mother, vazhi line that is, mother's line. Though every Tarwad is that, the term is ordinarily used to denote a component part of a tarwad consisting of a mother and her descendants. Mr. Justice Sadasiva Aiyar says that etymologically, the term does not include the mother. But as understood at present, it includes her. The term cannot however be said to have acquired a definite signification; for, sometimes the various branches into which a Tarwad splits up with no community of property in each other's property are also called Tavazhis the main family retaining the name of Tarwad. But that is not the ordinary use of either the term Tarwad or of Tavazhi. A Tarwad in which "there is community of purity and impurity but no community of property" is a misnomer. The word Tavazhi is not employed in connection with a branch unless it owns some property also. The way in which Tavazhi comes to own property is by division of Tarwad property for convenience of enjoyment. Another way, in which a Tavazhi comes to hold property is by inheritance. The third way is by gifts or by acquisition. This species of property is known as Putravakasam property. In Travancore, such property is called Makkathyam property. It derives its name from the fact that usually these gifts are made by fathers to their Marumakattayam wife and children. Each of these species of properties require a separate treatment. We shall deal with them separately reserving some comments on certain features common to all of them to the end.

As we said, one way and for a time the only way in which a Tavazhi came to hold property was by division of the Tarwad property for convenience of enjoyment. When the family becomes too large for single management the properties are divided and the units adopted for separate allotment are usually branches. Even where absolute division takes place ordinarily it is only done as

between branches, reserving a life interest for such of the members as do not constitute of any of the branches. The rule is as their Lordships of the Privy Council observe in a recent South Canara case *Sulaiman* v. *Biyaththumma* [1], "that division for the purpose of partition is stirpital." So that one not very infrequent source of litigation is the dispute as to whether an alleged division is only a division for convenience of enjoyment or an absolute, out and out partition. The recent case of *Sulaiman* v. *Biyaththumma* [1], is an instance in point. Among the circumstances referred to by their Lordships in support of a finding of absolute partition are separate residence, separate assessment, separate management and separate alienation. Where there are several houses bearing the same original Tarwad name says but with an addition and there is no evidence of the passing of a member of the house to another, Justice Holloway that there is the strongest ground for believing that a separation has taken place *Korapen Nayar* v. *Chenen Nayar* [2]. As observed in another case, though mere lapse of time cannot destroy community of property lapse of time without any apparent exercise of proprietary right is a very cogent circumstance against its existence and the presumption against it must tell with increasing force according to the length of time that has elapsed. Joint performance of religious ceremonies is a circumstance against but insufficient to rebut this presumption 9 I. C. 849. Forty years' separate enjoyment has been held to be sufficient to shift the onus (A. S. 18 of 1898 and A. S. 78 of 1878). In Travancore, enjoyment for even shorter period, (for 20, 25 years) has been held sufficient 24 T. R. 187, 19 T. L. R. 73. None of the circumstances above referred to can be held to be conclusive. It is a question of fact in each case, (as observed in a Travancore case) whether there is enough evidence of 'an intention to be divided in interest." When there is a deed or writing under which the disputed arrangements are made, the question as to their legal effect will have to be determined mainly with reference to the terms of the document. Short of express language, permanent arrangement for separate residence, management and assessment ordinarily means partition. Mutual liability to account and retention of any of the indicia of joint ownership such as joint patta, and restrictions on enjoyment and alienation, are more or less strong

1. (1916) 32 M. L. J. 137 at 141. 2. (1871) 6 M. H. C. R. 411 at 414.

circumstances tending in the opposite direction. Restrictions on alienation or on incurring debts by themselves, may not be of much significance; in certain circumstances restrictions on alienation may be indications in favour of absolute partition as they assume absolute power of alienation in their absence. Provision for joint incurring of debts, or joint alienation might indicate continuance of the joint status while rights of pre-emption should ordinarily be conclusive the other way. Words importing absolute division such as "bhaga" or "hise", might require the disregarding of subsequent imposition of restrictions on alienation as repugnant.

These arrangements are usually provided to last till the extinction of each branch but quite as often, no particular period is fixed for their duration and it is a question of considerable difficulty as to under what circumstances such arrangements can be revised. If the allotment is merely one for management and done at the instance of the Karnavan of his own will, there could be no question the arrangement could be revoked by him at any time. *Velia Kaimal* v. *Velluthadatha Shamu* [1]. If on the other hand the allotment is made for the maintenance of the branch though made by the karnavan of his own authority, the arrangement would not on the authorities be revocable by the karnavan unless and until he makes some other and suitable arrangement for the maintenance of the branch though the new arrangement might amount to no more than calling upon the members of that branch to come to the family house and live there. But more frequently these arrangements are the result of binding family karars in that case, they would not be revocable by the karnavan without recourse to courts. With reference to the question as to when the courts might be justified in superseding these arrangements, the following distinctions may be of use.

(i) The arrangement might be one for separate management primarily and separate enjoyment only subsidiarily but stated to be permanent.

(ii) It might be for separate enjoyment and intended to be permanent.

(iii) It might be a permanent arrangement for the maintenance of the branch.

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1. (1871) 6 M. H. C. R. 401.

(iv) Objects of the arrangement might be any of the above but the duration might be left indeterminate.

In the first case, no separate interest is created in favour of each of the branches and as a contract the arrangement would bind only the actual parties to it and children subsequently born would not be bound so far as their interests are affected by it. Again, in the last case also, the Court might have power to interfere if having regard to the changed circumstances, it should prove inequitable to hold parties to the original terms of the arrangement. In fact, it may well be presumed that it is an implied term of every such arrangement that it should continue only so long as the conditions are not substantially changed.

The same however cannot be said of the other two classes of arrangements. In effect they amount to permanent alienation of the right of enjoyment and the Courts would not have the power to alter them without the consent of the parties. It may be that in the case of merely maintenance arrangements, very strong words are necessary before they are held to be unalterable because ordinarily, maintenance arrangements are alterable on material change in the circumstances.

In respect of the properties allotted as above, the manager of each branch must stand towards the individual members of the branch much in the same position as the general manager towards the Tarwad including the liability to be removed (see *Kenath Pathan* v. *Narayan* [1] A. S. No. 31/05, 46, 47, 48/06) and his powers would be measured by necessity. But so far as the other branches are concerned, the validity of the alienations would largely depend on the nature of the arrangements. The assignment of the lands might be for the support of the branch till its extinction or it might be a permanent division for enjoyment. In such a case, possession could not be obtained for the Tarwad till the branch became extinct, any clause against alienation notwithstanding. But if the allotment is only for management and not for the absolute enjoyment of the branch, obviously other considerations would apply and the alienations would be valid only to the extent they are permitted by the deed of arrangement if any or in their

1. (1904) I. L. R. 28 M. 182 at 193.

absence, their validity should be examined by the ordinary tests of necessity and the properties could be recovered for the family by any member of the Tarwad if they fail to satisfy those tests. Ifthe allotment is temporary or revocable the alienee's interest must cease on the revocation of the arrangement. Subject to what we have said above, where property is assigned for the maintenance only of a branch, the branch would have no power to bind the Tarwad by its alienations by any appeal to necessity; the powers of the manager of the branch would be strictly powers of management. Temporary assignments for maintenance would not make the property immune from the binding debts or obligations of the family *Parrakel Kondi Menon* v. *Vadekentil Kunni Penna* [1], but permanent assignments might stand on a different footing especially in respect of obligations incurred subsequent to the assignment and independently of the branch.

(To be continued).

SUMMARY OF ENGLISH CASES.

In re : **Williams. Williams** *v.* **Ball**: (1917) 1 Ch. 1 C. A.

Deed—Memorandam on Life Insurance Policy—Construction —Assignment—Gift — Testamentary disposition or Power of Attorney.

Where a person who had a policy of insurance on his own life handed it to his house-keeper after indorsing thereon the memorandum; "I authorise my house-keeper and no other person to draw this insurance in the event of my predeceasing her, this being my sole desire and intention at time of taking this policy out and this is my signature," *held*, that the memorandum was a mere revocable authority to receive the moneys after the assignor's death and was a mere nullity because the authority would be revoked by the assignor's death.

Per Lord Cozens-Hardg, M. R.:—The indorsement was neither an assignment nor a gift because the assignor had not done all that was necessary to complete the gift. The memoran dum was if anything, in the nature of a testamentary document.

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1. (1864) 2 M. H. C. R. 411.

In re **Deprez : Henriques** *v.* **Deprez** : (1917) 1 Ch. 24.

Will—Operation—Documents not in existence at date of will when included in its operation—Bequests to children—Codicil—Direction in codicil that son should bring into hotchpot " advances appearing in books of account "—Advances subsequent to will and before and after codicil—Effect.

Where a testator by his will gave his properties to his children and by a codicil executed subsequently directed that all sums of money appearing in his books of account to have been advanced by him to his son should be brought into hotchpot and there were no entries of advances in the books at the date of the will but there were such entries between the dates of the will and of the codicil and also after the date of the codicil, *held,* that entries of advances in the account books prior to the date of the codicil were incorporated in the will but not entries subsequent to the date of the codicil.

Vanneck *v.* **Benham** : (1917) 1 Ch. 60.

Intestate's estate—Next of kin—Right in estate—Nature of right.

The interest of one of the next of kin in an intestate's estate is sufficiently specific to raise a case of election, representing as that interest does all the money's worth of the property comprised therein, but such interest is not sufficiently specific, apart from agreement with the other next of kin, to enable him to claim from the administrator any particular article as his own.

In re **Walmsley and Shaw's Contract** : (1917) 1 Ch. 93.

Deed of sale—Construction—Easement—Right of way when passes.

When a property with a particular mode of access apparently and actually constructed as a means of access to it is contracted to be sold the strong presumption is that the means of access is included in the sale. But where the road over which the right was claimed was a farm cart-track across a field used for all the necessary purposes of the farm, but not a made road, nor in any sense constructed as a means of access to the property contracted to be sold, *held,* that the right of way claimed did not pass by the

conveyance. The common words "with all ways thereinto appertaining" do not carry a right of way over another tenement of the grantor.

Dyson v. Peat: (1917) 1 Ch. 99.

Principal and Agent—Agent's right to indemnity against principal—Scope of—No right in respect of possible future claims.

The right of an agent to an indemnity against his principal for damages incurred in the performance of his agency does not exist in respect of a liability which may ripen into a debt but in respect of which no demand even had been made upon him.

Held:—An agent, who, in working a colliery for his principal, has rendered himself liable to future claims for damage by surface owners, has no lien, at law, or, in equity, upon moneys subsequently coming into his hands outside his agency but as trustee for his principal to answer possible future claims, where no liability has yet accrued.

Hill v. Settle: (1917) 1 Ch. 105.

Bankruptcy—Undischarged bankrupt—After-acquired property—Trustee's position as to—Trustee who has once intervened if can determine intervention—Determination if can be as from date anteceden to date of notice of determination.

The position of the trustee in bankruptcy as to after-acquired property of an undischarged bankrupt is that he may either claim it as assets vested in him as trustee, or, he may, if he thinks fit, allow the bankrupt to receive and use it for his own purposes just as if he were free from the disadvantages of being an undischarged bankrupt. When once he has made it clear that it is his intention to intervene and to assert his paramount title to the property the bankrupt is disqualified from giving a valid receipt for and from maintaining an action to recover such property. But a trustee who has once intervened can determine his intervention and he can determine it as from a date antecedent to his notice of determination.

Rex v. Lincolnshire Appeal Tribunal: Stubbins, Ex parte: (1907) 1 K. B. I C. A.

Appeal—Jurisdiction—Regulation as to service of notice of appeal in prescribed form—Nature of, mandatory or directory—Non-compliance with—Effect—Local tribunal authorised to grant Certificates of exemp

tion from military service--Chairman's application for certificate—Chairman sitting on tribunal on date of disposal of his application, though retiring from chair at time of disposal of his application—Propriety.

Where a statute in terms provided for a right of appeal in certain cases and for regulations to be made with respect to the constitution, functions and procedure of the original and appellate tribunals and where the regulation with reference to appeals provided that the party aggrieved might appeal by delivering to the original tribunal in the prescribed form, in duplicate, notice of appeal not later than three clear days after the decision appealed against and that the original tribunal should thereupon send to the other party the duplicate notice of appeal, held that the regulation with reference to service of notice of appeal was directory only and not imperative and that in a case in which notice was not served in the prescribed form but the opposite party was within the time allowed by the regulation verbally informed of the fact that an appeal was to be filed and of the grounds of the appeal, the appellate tribunal had ample jurisdiction to entertain the appeal.

Distinction between regulations which are mandatory and those which are directory only.

A local tribunal was authorised by statute to grant a certificate of exemption from military service. The chairman of the tribunal had applied for a certificate. On the date on which his application came on for disposal, the chairman sat on the tribunal till his own application came on for disposal, when he vacated the chair. The chair was then occupied by another member of the tribunal who had been sitting until that moment with the chairman and the chairman himself stood behind the new chairman while his application for exemption was being considered. Eventually a certificate of exemption was granted in his favour. *Held,* by the Division Bench that the certificate would probably have been held to be of no validity if it had been attacked and that the chairman ought not to have sat on the tribunal on that date.

Rex *v.* Christs' Hospital Governors : Dun, Ex Parte ; (1917) 1 K. B. 19.

Mandamus when proper remedy—Scheme for management of Hospital—" Recommendation "—Meaning—Persons to be appointed by one body " on recommendation of " another—Discretion as to appointment of person recommended.

Where a clause of a scheme for the management of a Hospital provided that a certain number of the council of Almoners should be appointed by the Governors *"on the recommendation of"* among other bodies, the Lord Mayor and Aldermen of the city of London, *held*, that the word " recommendation " meant nomination and that the Governors had no discretion as to appointing the persons recommended by the Lord Mayor and Aldermen.

Held, further, that in the circumstances, mandamus was the proper remedy to compel the Governors to perform the duty of appointing the person recommended.

Rex *v.* **Kennaway**: (1917) 1 K. B. 25.

" Dead Person "—Meaning—" Fictitious person " included.

Where the statute provided that forgery of a will of a " dead person" should be felony *held, semble,* forgery of the will of a fictitious person would be felony within the meaning of the statute.

In re **Hilckes. Ex parte Muhesa Rubber Plantations Ltd.**: (1917) 1 K. B. 48 C. A.

Alien Enemy—Meaning—Company in all other respects English but having commercial agent doing business in enemy country not prohibited from suing in English Courts—Distinction between alien enemy and Englishman carrying on business in enemy country—Bankruptcy—Proof by alien enemy creditor—Rejection of Proof—Validity.

Held, that a company, which was registered in England, whose directors were all English, whose secretary was English, whose meetings were held in London, the large majority of whose shareholders were English, but which happens to have a commercial agent doing business in an enemy country was not thereby constituted an enemy company and was not prohibited from instituting or carrying on proceedings in the English Courts during the continuance of the war.

Whether a company is an alien enemy is one question and whether a company which is not an alien enemy, but which carries on business in an enemy country thereby infringes the rules of the common Law against trading with the enemy is an entirely different question.

Per Scrutton, L. J.—An Englishman who at the outbreak of war had property in an enemy Country and who is not proved

to have done anything whatever with regard to that property twice is not prohibited from suing in English Courts.

Where on the bankruptcy of a person, one of his creditors, alleged to be an alien enemy, claimed to prove in his bankruptcy for the debt due to him and the trustee rejected his proof, *held*, that even if the creditor was an alien enemy the proof ought not to have been rejected but must have been postponed till the end of the war.

Rex *v*. Casement: (1917) 1 K. B. 98.

Ancient Statute — Interpretation — Reference to contemporary authority—Reference to how it has been understood for long--Propriety.

In construing an ancient statute regard may be had to the interpretation put upon it by contemporary authority and by judges and text-writers from time to time.

JOTTINGS AND CUTTINGS.

The Privilege of Solicitors.—An attack upon the established rule that communications between client and solicitor are privileged is reported to have been made by the military authorities in Ireland which intimately concerns practitioners in all parts of the kingdom. An Irish solicitor is said to have been placed under military detention because he refused to tell the military authorities how he came into possession of certain documents which he produced for the defence at the hearing of a case in Limerick. The military authorities appear to have proceeded under Regulation 53 of the Defence of the Realm Regulations:- 'The competent naval or military authority may by order require any person or persons of any class or description to furnish him, either verbally or in writing, with such information as may be specified in the order.' The words of this Regulation are certainly very wide, but they can scarcely have been intended to compel a solicitor to disclose, against the wish of his client, communications made to him in the ordinary course of his professional work. That would obviously be to make the administration of justice a mockery. No defence in a criminal case could properly be prepared—no legal business of any description could safely be transacted—if the confidence of solicitor and client could be

violated. The privilege is entirely in the client's favour, and the interests of justice sanction it. 'The foundation of the rule,' said Lord Brougham, 'is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings.' If the military authorities insist that they have been empowered to disregard this old-established rule, their claim will, we hope, not be recognised before the Regulation under which they profess to act receives a judicial interpretation. *The Law Journal, 13th Jan. 1917.*

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Gray and the Law.—Gray, the bicentenary of whose birth will be celebrated on Tuesday next, is among the many men of letters who have given up to literature what was originally meant for the law. Before he retired to Cambridge he made a languid study of the common law, and, though he had no special liking for legal things, showed a renewed interest in them by taking the degree of Bachelor of Laws on returning to his old University quarters.

I am got half way to the top of jurisprudence, and bid fair as another body to open a case of impotency with all decency and circumspection; you see my ambition: I do not doubt, but some thirty years hence I shall convince the world and you that I am a very pretty young fellow, and may come to shine in a profession, perhaps the noblest in the world, next to man-midwifery.

That was what, in his playful way, he wrote to Dr. Wharton, in 1742, when he was twenty-six years old. He never entertained, however, any serious desire to join the practising ranks of the Bar, and the allusion to man-midwifery was made, of course, in honour of the calling of the most intimate of his correspondents. Another reference to the legal profession, in a more serious vein, occurs in a letter he addressed to the most valued of his earlier friends, Richard West who did become a member of the Bar, seeking to dissuade him from leaving the Temple.

.. Examples show one that it is not absolutely necessary to be a blockhead to succeed in this profession. . . . Laws have been the result of long deliberation, and that not of dullmen, but the contrary; and have so close a connection with history, nay, with philosophy itself, that they must partake a little of what they are related to so nearly. . . . Are you sure, if Coke had been printed by Elzevir,

and bound in twenty neat volumes, instead of one folio, you would never have taken him for an hour, as you would a Tully, or drank your tea over him ?

What a pity it is that the 'most learned man in Europe' did not himself become a writer of books strengthening this alliance between law and history and philosophy, and worthy of being bound in this attractive form! He could have done it had he chose. Yet where even is the lawyer who would have wished the world to lose 'The Elegy in a Country Churchyard' for the sake of the most learned and elegant law book that could be written?—*The Law Journal, 23rd Dec. 1916.*

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The Business Names Act.—Bad in principle as most of our emergency legislation is, it has at least the all-sufficing excuse that it is designed for the safety of the Realm, and that it is limited in operation to the period of the war. No one quarrelled, therefore, with the law, which was passed soon after the outbreak of hostilities, restricting the right of change of name which had hitherto been common to all residents under the King's protection. It had always before been recognised as part of the common law that, as Chief Justice Tindal put it in *Davies* v. *Loundes* [1835], 'A man may if he pleases' and it is not for any fradulent purpose, take a name and work his way in the world with his new name as well as he can.' But the circumstances of the time made people suspicious of such changes, and for the period of the war the fraudulent purpose was assumed, at least in aliens. The reactionaries, however, who have found their opportunity in the abnormal conditions created by the war, have now succeeded in passing through Parliament, by methods appropriate only to emergency laws, a piece of legislation which is intended to be permanent and to stamp out, as far as a penal law can, every foreign element from British business. The Bill, which was introduced under the innocent title of the 'Registration of Business Names' Bill, has now passed into a statute under the same name (6 & 7 Geo. V., cap. 58), but the original Government draft has been altered beyond recognition, and the main purpose has become quite subordinated to the oppressive and inquisitorial provisions which now form the distinguishing features of this extraordinary Act.—*The Law Journal, 20th January 1917.*

Oppression by Legislation.—Every firm and every individual carrying on business (and 'business' includes profession) under a business name which does not consist of the true surnames of all partners or his own true surname, and every individual or firm who, or any member of which, has either at any time before or after the passing of the Act changed his name, must in future be registered in the manner directed by the Act. The particulars to be registered are 'the present Christian name and surname, any former Christian name or surname, the nationality, and if that nationality is not the nationality of origin, the nationality of origin,' and also the place of residence, and other business occupation (if any) of the individual, or of each of the individuals who are partners in the firm. Non-compliance with these searching requirements is an offence punishable not only by heavy penalties on 'summary conviction,' but by a general disability to enforce by action or other legal proceedings any rights under contracts made by the defaulter in relation to his business. All documents filed are to be open to puplic inspection, and any competitor in business of the registered firm or individual may require a certified copy of any registered statement for his own private purposes. As if this were not enough, it is further provided (S. 18), that very individual and firm required to be registered must set out in full the quoted particulars required to be registered 'on all trade catalogues' trade circulars, show-cards, and business letters on or in which the business name appears'; and if default is made in compliance with this section further penalties are to be incurred on summary conviction. The mistake of the Merchandise Marks Act, which served only as an advertisement for our present enemies, seems to have had no effect on the unthinking patriots who are responsible for these enactments. The oppressive character of the Act is not modified by its being made to apply to British-born subjects equally with foreign firms and individuals, but that burdensome fact may perhaps bring home sooner to the business community, and to the professions who are included, the unwisdom and impracticability of such legislation. This oppressive Act goes beyond any of the Continental models from which it is borrowed, and though it is not limited to the period of the war, it is to be hoped that it will not endure, or be endured, much beyond that.—*The Law Journal, 20th January, 1917.*

Ex-Lord Chancellors and their Pensions.—Because there now happen to be four Ex-Lord Chancellors the less responsible apostles of economy in the Press are complaining that the country is required to provide them with pensions amounting in all, to 20,000£. a year. It appears to be forgotten that the Ex-Lord Chancellors are qualified not only to take part in the judicial work of the House of Lords but also to sit on the Judicial Committee and in the Court of Appeal and that they are accustomed to earn their pensions by the services they render on these tribunals. If there were no retired Lord Chancellors to take part regularly in the work of these courts, the number of paid Law Lords would have to be larger. Lord Finlay's stipulation that his appointment as Lord Chancellor should not entitle him to a retiring allowance was certainly not intended to cast any reflection upon his predecessors who are receiving pensions. Nobody knows better than he how valuable are the services they continue to render in the administration of the law. The new Lord Chancellor's stipulation was due to considerations wholly personal to himself, and has been entirely misrepresented by those who have treated it as an occasion for attacking the usual order of things. Lord Campbell, who made a somewhat similar arrangement when he became Lord Chancellor of Ireland, makes this allusion in his autobiography to his pensionless state:—

> To this day many believe that I am in receipt of 4,000£. a year for having held the Great Seal of Ireland six weeks. I rejoice that I am poor and pensionless. The pension would have been very convenient for me and my family, and the services I am now gratuitously rendering to the public as a judge on the Privy Council or in the House of Lords would not be adequately compensated by the amount of the pension of an Ex-Irish Lord Chancellor, but it would have exposed the Government to obloquy and would have been a subject of very painful recollection to myself.

The circumstances in which Lord Campbell waived his claims to a pension bear, of course, not the slightest resemblance to those in which Lord Finlay has followed his example. What makes the quotation apt is Lord Campbell's allusion to his gratuitous services in the Supreme Appellate Courts. The office of Lord Chancellor may, from the constitutional point of view, be open to criticism, Walter Bagehot described it 'as a bundle of anomalies' and its intimate association of political and judicial functions makes the description not unjust. But what exactly is intended by the attacks made upon the pensions of the four distinguished lawyers who have held the office? Is it proposed that no Lord

Chancellor, no matter how short or long his term of office, should be entitled to a pension. That would inevitably mean since an ex-Lord Chancellor is not free to return to practise in the courts, that the most competent men at the Bar would not always be willing to accept the office.—*The Law Journal, 30th December 1916.*

CONTEMPORARY LEGAL LITERATURE.

The Journal of the Society of Comparative Legislation for January contains a life of Professor Dicey the great jurist Sir Charles Tupper traces the growth of the treaty making powers of the Dominions with foreign states. The Constitutional power of the Imperial Parliament is no longer used to compel its commercial policy with other countries to be adopted in the dominions. The self-governing colonies after considerable demur on the part of the colonial office are now permitted to regulate their own trade policy subject always to this restriction that it should not be such as to infringe upon the obligations incurred by the mother country in her treaties. The Imperial Government authorises its Minister at the Court of the Power which is to be treated with to carry on the negotiation and then technically it is the Empire which makes the treaty though the whole thing is managed by the representatives of the colonies concerned. The writer says that desire of the colonials is to have a voice in declaring peace or war.

Mr. Pelley discusses the proposals of Professor Keith, Mr. Lionel Curtis and Mr. Worsfold for a closer union of the Empire and rejecting the proposal for federal legistature suggest the utilisation of the Privy Council for the purpose.

Mr. Montmerency meets the criticisms of Maine, Bentham and Austin on the work of Blackstone and shows why he is entitled to high rank as a jurist. He was fully conscious of the defects of the criminial jurisprudence of England and was as a great critic of it as any of his contemporaries. Nor was he less conscious of the defects of the other parts of the jurisprudence of the country. He was not a professed reformer but he placed a true picture of the law on record and by so doing, substantially helped reform. The true criticism and it is at the same time the true praise of Blackstone is that he believed in a rapid evolution of the English

Common Law which would cleanse it from all impurities and bring it into close approximation to an ideal law. In this he was wrong but his faith in the capacity of the English Common Law without any very fundamental change to subserve the needs of the human race is fully justified by the event. That Law has been adopted in large portions of the globe and in entirely new conditions; in fact it divides with the law of Rome the allegiance of modern civilisation and William Blackstone played no mean part in the achievement.

M. De Becker gives an idea of the family council in Japan. It takes the place of the Court in England in the appointment of and in the giving of advice to the guardians. Professor William Bennett Munro of the Harvard University gives an extremely interesting description of the recent Municipal experiments in the United States. The policy of the states of America after the Declaration of Independence in respect of the constitutions of their Municipalities was to copy the state constitution with its double chamber and its checks and balances. The machinery was unwieldy and proved generally inefficient. The success of a temporary management of municipal government by a commission adopted in respect of a hopelessly mismanaged corporation led to its gradual adoption throughout. Under that system the entire legislative, and administratives functions are vested in a small body elected by the rate prayers. A certain per cent of rate payers are given the power to recall them. They may similarly veto their actions or require them to submit their byelaws to a referendum. This method of Government was a great improvement upon the old but still disclosed certain defects in working and the improvement generally adopted is to leave actual executive work in the hands of a highly paid expert. Mr. Hogg gives a survey of the company law in the British Empire. Some of the crown colonies have no company law at all nor feel the necessity for them but generally the English Company act with slight modification has generally been adopted In Canada, instead of incorporation as under the Company's Act, creations of companies by charter is adopted as a result of which there is no scope for the application of the *ultra vires* doctrine.

In the Law Quarterly Review for January, Mr. Willson continues his consideration of the question of insurance of foreign property in war time. He says that whereas a foreign assured may

recover against an English underwriter for loss accruing through the acts of his own Government if those acts take place whilst a state of peace exists between it and that of the insurer, the position of the assured where the acts occur after the actual out break of hostilities between the two governments has not yet been directly adjudicated upon. The doctrine of *Conway* v. *Gray* that the act of the Government must be taken to be the act of the assured also has no longer any support; nevertheless having regard to *Zanson* v. *Driejontien*, the claim is not likely to be decreed but on the more satisfactory ground of public policy. Another writer deals learnedly with the *writ* of *conspiracy* whether it existed at Common Law or whether it was due only to the statute of conspiration its scope and application.

In the *Harvard Law Review* for December. Professor Willinston takes cudgels against Professor Cook's view that the right of an assignee of a chose in action is legal rather than equitable. Professor Willinston maintains that though the assignee's remedies are legal, his right is equitable. The fundamental characteristic of an equitable obligation is according to the professor that it binds others only when their relation to that person is such that in conscience they should be subject to his duties. He tries to establish that the assignee's rights possess this characteristic by reference to the debtor's right to set-off, the effect of laten equities and the effect of a subsequent total assignment on a prior partial assignment.

Mr. Jenks continues his observations on Civil Law. He thinks that the success of the executive in England in repressing disorder and self-help has arrested the growth of "community action through law and he attributes the individualism of the English Law to the success of English men in life during the eighteenth century. The comparative completeness of the English Law of contract and incompleteness of the law of torts he traces to this undividualistic tendency of the English mind above referred to. Another very strong reason for the English man's respect for his law is according to the writer the fact that it is his own production. The "impersonality" of the English Law is similarly traceable to this tendency of the English mind. It is a less disputable and more purely juristic objection to English law that it

scandalously neglects minor reforms which it might easily accomplish but for pure inertia. Witness the anomalies of the law of seduction. Another charge often levied against English Law is that while it resorts freely to the coarse argument of physical force, and the somewhat base argument of pecuniary mulct, it makes little or no attempt te employ the more general sanction of reward but this criticism, the writer thinks is ill founded and the writer points to the recognition of "good will," passing off" of the assignability of chose in action &c. The writer does not believe that the power of testation is any great incentive to industry for he is of opinion that the desire of benefitting his posterity has ceased to be a leading motive in the industry of the average man in England.

BOOK REVIEWS.

THE INDIAN CONTRACT ACT WITH COMMENTARY *by T. R. Desai Vakil, Bombay* (*6th Edition* 1917.)

That Mr. Desai has to bring out 6 Editions of his book on the Indian Contract Act within very short intervals of each other is by itself a sure test of its popularity. Though the main features of the book are familiar to the profession to and students of law, we would draw attention to some of the details which make it popular both with the busy practitioner and the student preparing for law examinations.

To the busy practitioner it gives in their proper places a clear statement of the law on each particular head with references to the more important decisions brought up to date without embarrassing him with all the details which can be got at, easily if need be, from the references to leading cases given under each head. From what we have seen in the book, we can point as a special feature of this Edition, to the reatment of the effect of the war on the performance of contracts under S. 56 of the Act with references to the cases decided in England and India. To the student of law appearing for law examinations, the book under review will continue to be of invaluable assistance by reason of its various appendices containing a summary of the Act, the differences between the Indian and English Law, the explanations of technical terms, the explanations of legal maxims, the leading English and Indian cases on contracts, a brief state-

ment of the law of negotiable instruments and the University Examination papers for the L. L. B. degree of Bombay for the last 10 years.

THE LAW OF RECEIVERS. *By C. S. Somanatha Sastri and P. Ramanatha Aiyar, Vakil Trichinopoly (Lawyers Companion Series) Law Printing House, Madras* 1916.

We have great pleasure in welcoming the law of Receivers of the Lawyers Companion Series as a valuable book of reference to every lawyer's library. The book under review is one of the most exhaustive books on the subject and the authors have given wherever possible the references to English and American Cases on which this branch of law has largely grown. The statements of law and principles have been taken from the well known books on the subject so that the practitioners in the mofussil to whom all the treatises on the law of Receivers may not be available will find this book supplying a real want. We heartily recommend this publication to the profession at large and we congratulate the publishers on their success at the treatment of uncodified law after their "Law of benami transactions."

EVIDENCE, A POCKET BOOK, *By Arthur Eggar, B. A., Bar-at-law Higginbothams Ltd., Madras Price Rs. 2/4.*

This is an interesting attempt to restate the principles of the law of evidence in a sequence somewhat different from that adopted in the Indian Evidence Act, the statement of principles being conveniently interwoven with the connected matters of practice forming part of other enactments such as the Civil and Criminal Procedure Codes, and the Oath Acts,etc., as well as special rules of evidence or legal presumption like those contained in the Registration Act, the Stamp Act, the Negotiable Instruments Act etc. The result of the latest case-law is also embodied in the work though the citation of cases is very limited. The text as well as the notes are substantially in proposition form and discussion is almost completely avoided. This gives the book an appearance of being elementary but it is none the less instructive. The rules of law and practice are carefully and accurately stated and the practitioner will also find valuable hints here and there. The text of the Indian Evidence Act is printed as a kind of supplement

and a well arranged index completes the volume. A list of cases would it seems to us add in some measure the utility of this excellent little book.

THE LAW OF ARBITRATION.—*By A. K. Nanniah Lawyer's Companion Office, Law Printing House, Madras 1916.*

The book under review is intended to give the practitioner an idea of the law of arbitration scattered through various Acts of the Legislature and as understood by the judicial decisions both in this country and in England. The plan of the work is that it consists of three parts. The first part gives the Indian Arbitration Act which is largely based on the English Statute 52, 53 Vic. Ch. 49 with copious notes drawn from English and Indian decisions and from the leading text books on the subject. In this connection we should mention that the English Arbitration Act (52, 53 Vic. Ch. 49) is itself given as an appendix to the volume. The second part gives the provisions of the Civil Procedure Code relating to the law of Arbitration fully annotated under appropriate headings. In the third part are collected the provisions from various enactments of the Imperial and Local legislatures, dealing with arbitration. This part is particularly valuable as it gives a comprehensive view of the law of Arbitration as applied to special enactments. As this volume is conceived on the same lines of Lawyer's Companion Series it will be of great use to the busy lawyer as a book of ready reference. So far as we have seen the notes are very full and carefully written and we have no hesitation in recommending it for the use of every one to deal with the law of Arbitration.

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THE VICEROY ON THE HIGH COURTS AND THE PRESS ACT.

The independence of the Judiciary is the foundation for "the rule of law" which obtains in every country to which the English jurisprudence has been extended, and is the only guarantee for individual freedom and rights of property. Whether it be proper or not, for a Judge to condemn the policy of an enactment or to pass "a censure" upon the Legislature, there can be no doubt that an attack upon the judiciary by the executive is inconsistent with the essential principles of the British Constitution and is fraught with great danger to society as it is sure to undermine and sap judicial independence. Such an attack is all the more objectionable, as the subject of the attack is not in a position to defend himself, being prevented by the long established and well understood traditions of his office from entering the arena of political controversy.

In the columns of a Journal such as this we have nothing to do with the wisdom of the action taken by the Executive under the Press Legislation. But we feel that we shall be failing in our duty if we do not take exception to certain statements in the reply made by His Excellency the Viceroy on the 5th March 1917 to the Press Deputation, as the viceregal utterance in certain parts of it is in direct violation of the principle of the immunity of the judiciary from all forms of attack by the executive. Not only are the criticisms of the Viceroy improper from the constitutional point of view but they seem to be also unjustifiable in the circumstances of the case.

In the first place, referring to the dicta of the two Indian Judges in regard to the character of the press legislation, the Viceroy begins by stating that it is not the function of a Judge to say what the law ought to be but to decide what it is; and lower down in the reply His Excellency proceeds to point out that the Officiating Chief Justice of Madras would have hesitated before describing the keeping of printing presses as "an

extremely hazardous undertaking" if only the Chief Justice had before him the statistics which His Excellency placed before the Deputation. His Excellency winds up by saying that the pronouncement as to the Press Act being an encroachment on the freedom of the Press is a "pronouncement appropriate enough to the Council Chamber."

It is no doubt true and no reminder is needed that it is the function of a Judge to decide only what the law of the land is and that the judiciary is not in any sense a court of appeal from the Legislature. But at the same time it is quite consistent with the highest judicial tradition in England for Judges to offer judicial criticisms on the law of the land and it is a historical fact that legislation has been moulded to some extent by judicial criticism of existing enactments. We find Judges offering criticisms on the wording of enactments in very strong terms though technically the Judges of the land as trained experts are only to interpret the enactments even though they be confused and unintelligible. Lord Fitzgerald described an Act of Parliament as the result of malicious ingenuity. Lord Macnaghten spoke of the Finance Act of 1904 as strangely expressed and singularly ill-drawn.

But even apart from that we are aware of no rule of judicial etiquette that precludes a judge from stating the *nature or effect* of a particular piece of legislation. Judges have also criticised the methods pursued by the Legislature during the passing of an enactment. Says Mr. Justice Mathew in L. R. 26 Q. B. D. at 195:—"The difficulty has arisen not from anything inherent in the object itself, which is simple enough, and might be quite simply treated, but from the mode of legislation now usual in these matters." And not infrequently do we find Judges denouncing in strong terms enactments which infringe the liberty of the subject. A purely lawyer Judge like Lord Watson did not feel that he was travelling beyond his province as a Judge when he characterised a proclamation of the Governor of Cape Colony "as autocratic Legislation" "little calculated to enhance the repute of British Justice" even on the basis that such legislation was *intra vires*, *Sprigg* v. *Sigcau* [1]. Nor did a great Judge like Lord Macnaghten whose passion for Justice was well known think it

1. L. R. 1897 A. C. at 247.

out of place to remark that an enactment passed by the Provincial legislature of Manitoba was "extremely stringent, more stringent probably than anything that is to be found in any legislation of a similar kind" though he came to the conclusion that the legislation was *intra vires*.

We cannot appreciate the reasoning of the Viceroy when he says that the Chief Justice of Madras would have hesitated to characterise the keeping of printing presses under the Press Act as a hazardous undertaking if the Chief Justice had the statistics before him. The accident that under a particular administration, the Act may be worked well or ill can have no bearing on the effect of the enactment. The hazardousness consists in the working of the Act being dependent upon the idiosyncrasies of individual administrators and in the uncertainty that the subject feels as to the law he is to obey. The reference to the Council Chamber in His Excellency's criticism is extremely inappropriate and should have been avoided even if it was in response to some statement made by the deputation.

Not content with dilating upon the functions of Judges in the matter of Statutory interpretation, His Excellency indulges in criticism bordering on censure, when he says that "the Chief Justice of Madras in giving a testimonial to Mrs. Besant of her *bona fides* and loyalty was dealing with an issue which was not only not before him but with regard to which he had not the materials to formulate a decision." Under S. 20 of the Press Act, in considering the effect or tendency of any particular article alleged to be the basis of the forfeiture, the court is entitled to look at other articles in aid of the proof of the nature or tendency of the article in question. In the particular case before their Lordships the Crown relied on certain articles and the petitioner on certain other articles and these articles were discussed before the learned Judges. The petitioner addressed an argument that the court is bound to look at the general policy of the paper and should have regard to the various expressions and manifestations of loyalty apparent in the various articles published from time to time. The Advocate General contended that the general intention was immaterial and that the other articles were only a guide to the interpretation of the particular articles in question. In these circumstances it cannot be said that the learned Chief Justice was dealing with an issue which was not before him or purported "to formulate" a

decision without having the necessary materials before him for such a decision, when he made the remark that "the articles placed before him did not lead him to doubt in any degree the sincerity of her protestation" or when he acquitted Mrs. Besant "of any wilful attempt to disseminate disaffection or hatred against the Government of the Country or to create feelings of hatred against any class of His Majesty's subjects." As observed by Lord Mac naghten, "What has the Court to do with the Executive? Why should the Executive Government take upon itself to instruct the Court in the discharge of its proper function?" *Wallis* v. *Solicitor-General of New Zealand* [1].

Referring to the view of the majority of the learned Judges that the act of the magistrate in cancelling a previous order relating to the security furnished by Mrs. Besant was *ultra vires*, His Excellency remarks that the Press deputation "omitted to notice that the learned Judges were not on agreement on the point and that as the learned Judges had admittedly no jurisdiction in the matter, their remarks were in the nature of *obiter dicta*." We cannot but express our surprise and disappointment at this statement of His Excellency. Having regard to the opinion of the Majority of the Judges, we should have thought that it was the duty of the Viceroy to express his regret for the ultra vires Act of the Magistrate and to have assured the Press Deputation that there would be no recurrence of such acts. His Excellency must have been aware quite as well as we are that "It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, it is the duty of the Executive in cases of doubt to ascertain the law in order to obey it, not to disregard it. The non-existence of any right to bring even the Crown into Court does not give the Crown immunity from all law or authorise the interference by the Crown with private rights of its own free will." L. R. 1915 A. C. 750.

As regards the disagreement among the Judges on the question as to whether the order of cancellation of the Magistrate was *ultra vires*, though there is no reference in His Excellency's reply to the fact that the Judgment is that of the majority of the Judges, His Excellency must doubtless have been aware that the Judgment of the Court is that of the majority, We are unable to

1. (1903) A. C. at 188.

appreciate the remark that because it was held that the petitioner was remediless in the particular proceeding before their Lordships, their observations with regard to the legality of the order of the Magistrate are in the nature of *obiter dicta.* The legality or otherwise of the order and the jurisdiction of the Court to redress the illegality in the particular proceeding, were strenuously argued both by the Counsel for the petitioner and the counsel for the Crown. Assuming that the Court had the jurisdiction to grant a remedy, it was necessary for the Court to decide whether the order was legal or not. There was every chance of the matter going up before another tribunal; the question itself was one of great public importance. It was therefore not only the right but the duty of the Court under the circumstances to have expressed an opinion on the legality of the act of the Executive. In a recent case before the Judicial Committee in an appeal from New South Wales the question arose, whether a particular appropriation of waste lands by the Government was authorised or not. The action was laid by a private person without the consent of the Attorney-General. The Judicial Committee came to the conclusion that the action ought to be dismissed on that ground. But at the same time their Lordships thought it better " not to dispose of a case which has attracted some public concern on that formal ground." And their Lordships proceeded to discuss the legality of the act.

Again, in the decision reported in L. R. 1894 A. C., page 347, the House of Lords came to the conclusion that certain proceedings were not properly laid under the Patents, Designs and Trade Marks Act. And yet the Lord Chancellor of the day, Lord Herschell, proceeded elaborately to discuss the question whether certain rules passed by the Board of Trade were *ultra vires* of them or not, though the expression of any opinion on the matter was unnecessary for the disposal of that case. We do not think it necessary to multiply instances to show that even in ordinary cases between a subject and a subject the Judicial Committee very often express their opinion on points argued at the bar.

We would not have entered on this criticism of His Excellency's reply to the Press Deputation but for the fact that there has been growing of late a regrettable tendency on the part of the Executive to treat the Judiciary with scant respect. Some years ago we

drew attention in the pages of this Journal to the very undignified way in which during the debates on the Land Encroachment Bill, the then acting Governor of Madras referred to "the mania abroad as to the value of and respect to be paid to the judgments of the High Court". And our criticism of the Viceroy's speech is none too strong when we remember that that utterance had the effect of calling forth the following homily in a Calcutta newspaper. "The only thing for a Government which finds its best intentions nullified by the superintelligence of law courts is to re-enact what it promises in clear language sufficient for the most muddle-headed High Court to understand."

We would close our remarks with the hope that the Executive in this country would act with due regard to the following observations of Lord Alverstone, "It was a great thing that the subjects of His Majesty should feel that their interests would be protected by an impartial construction being given to Acts Parliament...... ....he trusted that His Majesty's judges would always be regarded as the impartial tribunal to whom was to be given the duty of interpreting Acts of Parliament..... and he hoped that the time would never come when it would be considered that the Executive Government was to be its own interpreter of Acts of Parliament." It only remains to add that no rule of mutuality applies to the relations between the Executive and the Judiciary; for, while criticism and control of the Executive by the Courts is the very basis of the "Rule of law" which as Professor Dicey demonstrates is the characteristic feature of the British constitution, the converse, *viz.*, criticism of the Judiciary by the Executive is opposed to and utterly subversive of it.

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TAVAZHI PROPERTY.

(*Continued from p. 29*).

The analogous case of the Hindu widow may be usefully considered in this connection. So long as the widow's claims are not fixed and she is residing with the family, she is presumed to acquiesce in the *bona fide* dealings by the family with the family property and the creditors are entitled to proceed against it irrespective of her claims but when once they become fixed, though even thereafter she may be entitled to participate in the improvement in family fortunes and may in certain circumstances be affected by an adverse turn in them, neither the family nor the creditors can affect her rights. The interests of the junior members of the Malabar family are no doubt proprietary unlike those of the widow and also unlike in the case of the widow, the family management even after the maintenance arrangement is in theory still conducted for his direct benefit. Giving due weight to these differences there still remains an element of similarity between the two cases and it would seem legitimate to hold that the property assigned would not ordinarily be liable for the family obligations which the branch in question has not joined in incurring. Apart from the analogy above indicated there are two ways in which this result can be legally deduced. (i) In the circumstances the authority of the Karnavan and the other members of the family must be restricted to dealing with the remaining property and any obligation incurred thereafter should be held not binding on the maintenance allotment, (ii) As between the family and members in question and consequently as between persons claiming through the family and the members in question so much property must be deemed to be taken out of the category of family property, disposable for the ordinary purposes of the family.

In a recent case *Cheriya Pangi Achan* v. *Unnalachan*,[1] it is suggested that the courts cannot depose Karar managers when there is a *de jure* Karnavan though with powers cut down yet not altogether deprived of them. The ruling leaves unaffected the liability of managers of branches to be removed at the instance of the members of the branch for whose benefit the properties are assigned. Just as the Karnavan derives authority to deal with the tarwâd property from his natural position, the eldest member of the branch derives his authority to deal with the property assigned to his branch from his position as such eldest member and there is no reason in principle why the one should be liable to removal for mismanagement and not the other. Failure to recognise the possibility of a "co-parcenary within a co-parcenary" or to put it in the analogous Marumakkathayam terminology of a "tarwad within a tarwad" is responsible for much of the confusion in this branch of the law. The difficulty felt by Malabar Lawyers in grasping this simple idea was due to the late recognition in that system of the capacity of the Tavazhi to inherit property. It was finally recognised only in the Full Bench case in *Krishnan* v. *Damodaran*[2].

Another of the positions suggested in that case is that a family arrangement can be set aside without reference to court by a majority vote in the family council. Though this is extending the "corporation theory" of the family beyond the hitherto recognised limits, we do recognise that the rule as ordinarily stated that the karnavan cannot revoke family arrangements of his own authority but must resort to courts may require a re-statement. The rule really amounts to no more than this—that the family arrangement cannot be put an end to by a karnavan arbitrarily as he can concessions made by himself but he can do so only on the coming into existence of circumstances that make a revision essential in the interests of the family and he may be assisted by a majority vote in persuading the court that it is so. Another proposition laid down in the case is that the arrangement is good only for the life-time of the Karnavan who has agreed to be bound by it. But we think that this presumption ought to be confined to cases where the arrangement is made primarily for the better

1. (1916) 32 M. L. J. 323. 2. (1915) I. L. R. 38 M. 48.

management of the family lands. Where the arrangement is made with a view to more equitable enjoyment of the family lands or to provide for the maintenance of a branch, the presumption ought to be, we think, that the arrangement is intended to continue till a substantial change in the circumstances occurs.

Another type of property which a Tavazhi holds, as we said before, is inherited property. For a long time it was thought that in Malabar the Tarwad alone was entitled to inherit but this is no longer the law. In the case of women, their descendants inherit their property and hold it with the incidents of tarwad property. Under the allied system, the Aliyasantana Law of Canara, the self-acquisitions of individual members always descend on the Tavazhi in preference to the tarwad and the rule is, as stated in *Manjappa Ajri* v. *Marudevi Hengsu* [1], that the nearest Tavazhi succeeds — one's own Tavazhi, in default the mother's Tavazhi, in default, the grand mother's Tavazhi and so forth with rights of representation &c. This right of representation is an advance on anything known to the Hindu Law under which it is confined to property inherited from lineal male ascendants. Malabar is much under the spell of group succession and if the Tarwad is got rid of, it could only think of the next handy group the Tavazhi to succeed. That individuals can succeed is beyond doubt but that is only when there are no groups to succeed. What is to happen if the group that would normally have been entitled to succeed to a certain property is to be split up into several minor groups ? All analogies point to the groups taking as tenants-in-common, each group however taking its share with incidents of tarwad property.

Another way in which the Tavazhi comes to own property is by gifts from father, or brother or uncle, for the matter of that gifts from anybody provided that it is intended that the gift is to enure for the benefit of the branch as such and not merely for the benefit of the individual members. The only difference between the gifts last named and others is that whereas there is generally a presumption in the former case (the extent of the presumption we shall presently consider) that the gift is intended to enure for the benefit of the branch, in other cases it must be made out to be so. The legal possibility of a gift to a branch with the incidents

1. (1915) I. L. R. 39 M. 12.

of tarwad property was once doubted but has since been affirmed in numerous cases. The question arose for the first time in *Narayanan* v. *Kannan* [1]. There there was gift by a father in favour of his wife and children and he expressly provided that the property should be held with the incidents of tarwad property. The High Court held that such a provision was invalid being repugnant to the grant. In *Kunhacha Umma* v. *Kutti Mammi Haji* [2], the Full Bench however overruled the case. In so doing it laid down two propositions: (i) when there is a gift by a father in favour of his wife and children, there is a presumption that the property is intended to be given to the branch (ii) that it is intended that it should be held with the incidents of Tarwad property. This decision was by some felt to be unsatisfactory and various attempts were made to get round it. One suggestion was that it applied only to cases where the branch relinquishes its interest in the Tarwad property and thereby becomes a tarwad by itself. *Kenath Puthen Vittil Tavazhi* v. *Narayanan* [3] and *Ammanga* v. *Appadorai* [4]. This was qualified later on into one that the Tavazhi must have been living separately. The reason given was that joint tenancy outside joint family was unknown and the only joint holding (apart from tenancy-in-common) known to the law was holding by the tarwad. We have already traced the genesis of this fallacy. It was also argued that the Tarwad Karnavan alone was the person bound to maintain the members and was the lawful guardian of the minor members and what, in those circumstances was to be the position of the Tawazhi Karnavan. Had he simply to draw the income and accumulate it or was he entitled like the tarwad Karnavan (as was said of him in some cases) to have un-controlled powers of disposition over the income? This doubt has since been set at rest by the Full Bench in *Chakkara Kannan* v. *Kunhi Pokker*, [5] which holds that the junior members are entitled to have maintenance from the branch property. We shall more fully develop this aspect of the case when considering the incidents of tarwad property that apply to this kind of property. Another and more substantial objection was that in the case of Marumakkathayam people the possibility of the wife taking another husband and having children by him must always be present to the mind of the donor

1. (1884) I. L. R. 7 M. 315.
2. (1892) I. L. R. 16 M. 201. (F. B.)
3. (1904) I. L. R. 28 M. 182.
4. (1909) I. L. R. 34 M. 387.
5. (1918) I. L. R. 39 M. 317.

and the intention of benefiting this latter cannot reasonably be expected of him but that would be the result if the property is taken by the branch as Tarwad property. The answer that may be given is that while the view that the branch is to take might occasionally give other people the benefit of the grant (who would certainly have it, even if the other view is taken, as descendants of the mother when succession opens out to the mother's share) the alternative view would almost always give an unfair preference to the children in existence at the time of the grant. Mr. Justice Sadasiva Aiyar makes a bold suggestion that sub-tavazhis consisting of a woman and her children by a particular husband might be recognised but so far it is only a suggestion thrown out and has not received much support though there is no reason why the hitherto accepted legal categories must be considered exhaustive. It was once thought as to easements that their number could not be added to; the Privy Council has told us that this is a wrong notion. Certain ideas were prevalent in England as to fishery rights in rivers &c. The Privy Council has deprecated the application of those ideas to the Indian physical conditions. It is an accepted idea in England that unincorporated bodies like a village or a community cannot hold property. This is not the view taken in India. There are many other directions in which what one should have thought were fundamental ideas of English jurisprudence have been held to be inapplicable to eastern conditions. On the whole we think it is more a question of usage than of positive legal theory. If, as a matter of fact, properties are held by such groups, there does not seem to be any insuperable barrier to giving effect to the usage. Though it may now be taken to be settled that a branch can take property with incidents of Tarwad property, there is considerable scope for doubt as to the exact circumstances in which the inference that the gift is one to the branch will arise, and as to the incidents of Tarwad property that will appropriately attach to such property when held to belong to the branch. Putting aside the case of a grant to a branch as such, and the case of a grant by a father to his wife and children merely or to wife and all the children then existing or after the death of the wife to all the children which is governed by the Full Bench in *Chakkara Kannan* v. *Kunhi Pokker* [1] it can by no means to be said to be

1. (1916) I. L. R. 39 M. 317.

clear under what other circumstances the inference will be made. However, the inference has been drawn in a case where the gift was by the uncle to his nieces the mother being dead. (L. P? A. 19 of 16). Having regard to the usual origin of Tavazhi property from fathers, uncles and brothers as stated by Mr. Justice Sankaran Nair in *Chakkara Kannan* v. *Kunhi Pokker*[1] at p. 321, it would seem legitimate equally in all those cases to draw the inference. If the gift is to a sister and her children, the sister and her children will take as a branch; if it is to all the sisters, they will not take it as a tarwad unless at the time of their taking it, they are the sole members of the branch. However if it is clear that the sisters and their children are intended to take, the intention of the donor can be given effect to by taking the grant as a grant to the sisters as tenants-in-common but each sister to take her share as Tarwad property. The analogy of *Nagalingam* v. *Ramachandra Tevar*[2] would justify the raising of the inference in all cases in which the donees would in the absence of a gift in their favour take as heirs which under this system can only be with incidents of Tarwad property. It may be a question for consideration where a transfer is to all the members of the branch whether on the principle of Hindu Law that all *joint acquisition* of all members of the family is presumed to be family property, it should not be presumed *prima facie* to be property of the branch. Where the acquirers represent only one generation, the presumption may be weaker than when several generations join, though the presumption may arise notwithstanding that some do not join. Now suppose the gift is by the relations mentioned above but the gift is in the name of one or only some of the members of the branch then existing. What is to be the presumption? The law on this question is not quite settled though according to the Full Bench, when the gift is to wife and children, the conferring of the power of alienation &c., is an immaterial circumstance. As the question is one of construction of the grant with reference to the surrounding circumstances, if the words of the gift are clear that the gift is intended for the exclusive benefit of the donee, then the presumptions raised by the Full Bench are necessarily excluded and the donee will take absolutely. Similarly if the words are clear or from the surrounding circumstances the inference is clear that the grant is to the donee

1. (1915) I. L.R. 39 M. 317. 2. (1901) I.L. R. 24 M. 429.

as representing the branch then also, the presumption raised in some cases in favour of exclusive gift would not avail. Subsequent dealing with the property might undoubtedly be of use in determining whether the gift was made or accepted on behalf of the branch. Apart from all other circumstances, in the cases coming within the general rule, it seems to be a proper presumption to raise that when the gift is made to a person who ordinarily or in law represents the branch, he takes it on behalf of the branch and the presumption must be the more readily drawn when there is already property in his management as representative of the branch. In two cases, *Narasamma Hegadithi* v. *Billakesu Pujai* [1] *Dwija Bhandari* v. *Venku Bhandari* [2] it has been held that a gift to a wife alone (when there are children alive) must be taken to be to her absolutely, while in another case it is said that the fact that the transfer stands in the name of the eldest male and the eldest female might be an indication that the acquisition is intended for the branch, *Ammanga* v. *Appadorai Patter* [3]. If there were two gifts on the same day one in favour of the mother and another in favour of the eldest son the presumption would be that either the one or the other, preferably the latter was not intended for the branch, but if the interval between the two is long, the presumption is weak. *Naku Amma* v. *Raghava Menon* [4]. In one case, the fact that with the eldest male member, a junior male member was also joined was considered a circumstance for inferring that the branch was not intended to be benefitted. (A. S. 3 and 4 of 15.) In *Naku Amma* v. *Raghava Menon* [4] Mr. Justice Miller thought a gift to a woman *simpliciter* by the husband without words of alienation or inheritance was a strong circumstance in favour of the branch. In *Paru Amma* v. *Ittichti Amma* [5] Coutts Trotter and Srinivasa Aiyangar, JJ., thought that express grant of the power of alienation to the donee was conclusive in favour of exclusive gift to the donee. Applying the rule to Aliyasanthana cases, when the mother is alive (who is the *de jure* manager of the branch) a gift in favour of the eldest son ought not to be presumed to be for the benefit of the branch ordinarily and in the absence of evidence that he is managing other properties of the branch. It should be otherwise in a Malabar family where

1. (1913) 25 M. L. J. 637.
2. (1915) 31 I. C. 854.
3. (1910 I. L. R. 34 M. 387.
4. (1912) I. L. R. 38 M. 79.
5. (1915) 32 I. C. 459.

the eldest male represents the branch. It has been held that where the gift is to a woman, it is not essential that it must expressly purport to be for the benefit of herself and her children though it is possible that in the absence of such a statement when there are children in existence, the gift may be held to be hers exclusively.

The next question, which is not altogether settled is as to the incidents of tarwad property that can appropriately be held to attach to this type of property. The following incidents have been held to attach to the property: (i) impartibility and inalienability of individual member's shares, *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], *Chakkara Kannan* v. *Kunhi Pokker* [2], *Pattatheruvath Pathumma* v. *Mannam Kunniyil Abdulla Haji* [3], *Kunhamina* v. *Kunhambi* [4], (ii) Single management, *Abdulla* v. *Chekhotti* [5], *Parvati Kuttilammah* v. *Ramachandra Ejman* [6], (iii) Survivorship, *Korath Amman Kutti* v. *Perungothil Appu Nambiar* [7], *Chakkara Kannan* v. *Kunhi Pokker* [2], *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], (iv) Right of the members subsequently born, *Kalliani Amma* v. *Govinda Menon* [8], *Katankandi Koma* v. *Siva Sankaran* [9], (v) right of maintenance of junior members, *Naku Amma* v. *Raghava Menon* [10], *Chakkara Kannan* v. *Kunhi Pokker* [2], (vi) Liability of the managing members to be removed, *Parvati Kuttilammah* v. *Ramachandra Ejman* [6]. As regards maintenance though it has been decided that for the award of maintenance from the branch property, it is not necessary that the tarward should be unable to maintain the members, it is yet a doubtful question how far the ordinarily understood limitation on the right to maintenance, *viz.*, that the member should reside in the Tarwad house applies to the right to maintenance from the branch property. If that condition should be considered to inhere to the right of maintenance from the branch property, the very object one should think of such gifts would be frustrated for in the absence of some maintenance arrangement in the Tarwad the benefit of both properties can never be had by any member other than the

1. (1892) I. L. R 16 M. 201=2 M. L. J. 226. (F. B.)
2. (1913) I. L. R. 39 M. 317=29 M. L. J 418. (F. B.)
3. (1907) I. L R. 31 M. 228.
4. (1908) I. L. R. 32 M. 316.
5. (1910) 20 M. L. J. 368.
6. (1910) M. W. N 124.
7. (1906) I. L. R. 29 M. 322.
8. (1911) I. L. R. 35 M. 618.
9. (1910) 20 M. L. J. 134.
10. (1912) I. L. R. 38 M. 79.

manager. We should rather think that it is not a condition to the getting of maintenance from the branch property. Duty to reside in the family house is a duty cast on the junior member and he cannot be deprived of his right to maintenance for his due observance of his duty. Viewed from another point of view also the same result follows. In respect of conflicting rights and duties, the tarwad being the body of which the branch is only a part, the rights of the tarwad and the tarwad manager must have preference. If the right of guardianship inheres under the customary law in the Karnavan the branch karnavan cannot have it. Similarly, the right to regulate the movements of the junior members on which really the duty to reside in the family house hangs vests in the karnavan and the branch karnavan cannot have it unless it has been lawfully delegated by the karnavan. This is true not only of this type of property but also of maintenance arrangements for the branch though it would be different in the case of allotment to the branch of portions of family property more or less permanently for its enjoyment or management. It is again extremely doubtful if the rule as to non-accountability in its extreme form really applies to the branch manager in respect of these properties or in any other case when there has not been at least *pro tempore*, in vesting of the branch manager with the Karnavanship in respect of the branch property. The duty and the right of the branch manager is only to manage the property. Non-accountability of the Karnavan even, is in truth but a fetish. What it really means is that he is not like a trustee liable to keep accounts and bound to justify every disposition by him. He has a large discretion in the utilisation of the family funds for purposes of the family subject to certain imperative duties such as maintaining ths junior members &c.; as between the several purposes, he may starve one and favour another and he has also a large discretion in determining what is for the family benefit. He has to protect the members of family, look to their marriage and education and generally look to the religious and other interests of the family. With the range of duties that he has to perform and the discretion that he has in the selection of purposes and the amounts to be spent, taken with the rule that for mere carelessness, want of superior capacity or small lapses he will not be removed, in practice, he has large and uncontrolled powers,

Except in this way it is perfectly clear that he has no larger beneficial interest in the income than an ordinary member. It is now settled that he cannot use the family income for any purpose other than a family purpose. Coming to the case of a branch manager, owing to the smaller range of his duties, and the objects for which the fund in his charge can be applied, it may be his control, in practice, is less large though in strict theory there is no difference between the two cases.

The next point on which there is room for considerable doubt is as to the presumption as to acquisitions. The ordinary presumption is that the property standing in the name of a junior member is tarwad property. What is the presumption where the acquisition is in the name of a member of a branch which owns properties. ? Where the property is allotted to the branch for management by the tarwad, it is perfectly clear that the ordinary presumption would apply. If the property is assigned only for maintenance the presumption, one should fancy, is to be the other way for maintenance is a personal or individual right and the savings if any made by the member or the branch must be presumed to belong to the member or the branch rather than to the tarwad. Coming to the case of Putravakasam property, solution of the conflict of presumptions that must arise would be one of some nicety. The possible cases that might arise with respect to this are (i) as between the tarwad and the branch (ii) as between the tarwad and the individual members of the tarwad setting up branch title (iii) as between the branch and the individual members of the branch setting up self-acquisition (iv) as between the branch and its individual members setting up tarwad title. The first case is really analogous to the ordinary case of a dispute between a tarwad and an individual member uncomplicated by any question of branch. It is a case of self acquisition set up by the branch and it is for the branch to prove self-acquisition. It will have to prove a possible independent source of acquisition and non-user of the family funds. The presumption being one of fact, both or either of the circumstances might suffice to repel the inference If the branch has family property in its possession the burden would be heavier on the branch to prove self acquisition. The difficulty would really arise where the branch has not family property in possession but its manager has. In its ultimate analysis, the basis of the presumtion in favour of family property will be found

to be (i) possession of family funds (ii) capacity to throw into the common stock (iii) duty to account. In the case in hand, the second condition is not existing for itis not open to a single member though manager to giveup the rights of the junior members. Under these circumstances there should be no presumption either way and it should be for the party setting up the one or the other case to establish the case put forward by him. The second case again, is not much different from the case of a Tarwad and ordinary member. It is analogous to the case of a junior member owning self-acquisition setting up self-acquisition. In the third case, the burden should be on the junior member to show that it is his self-acquisition. Whatever difficulties there might be when there is a conflict between the tarwad and the branch, it is certainly for the junior member to show that the property is his self-acquisition but the fourth case is not quite so easy. This case is analogous to the first. Though where the conflict is between the branch and the tarwad, it may be that the burden would in some cases lie on the branch, and in some cases there would be no presumption, that is no reason why the individual members should take the benefit of that state of things when they do not represent the tarwad. It is for them to show out of which fund they got it, and in the absence of evidence, it is the more legitimate presumption that they acquired it out of the branch funds over which they have larger beneficial interest than out of the tarwad property; the presumption ought to be stronger when the member concerned is the manager of the branch. In some earlier cases, it was held that there was no presumption in favour of the branch unless the branch withdrew itself from the tarwad and lived separately. This was as a part of the general theory that the presumption of branch property with incidents of tarwad property would not arise unless those conditions applied; so far those cases are no longer law. But even under those conditions in *Mari Vittil Chathu Nair* v. *Mari Vittil Sekaran Nair* [1], Sir Arnold White, C. J. and Krishnaswamy Aiyar, J. thought that where possession of tarwad funds was negatived, the acquisition by the manager of the branch is to be presumed to be that of the branch. The proposition as stated in the earlier cases, seems however to possess this valuable element of truth that where there is a separ-

1. (1909) I. L. R. 33 M 250.

ate residence of the branch and living as tarwad practically for all purposes, the presumption in favour of the branch should be more readily drawn than in the other cases.

SUMMARY OF ENGLISH CASES.

Hampton *v.* Glamorgan County Council: (1917) A. C. 13.

Contract—Construction—Cases relating to construction of similar contracts—Value of—Building contract—Construction—Specialist employed by contractor—Liability of building owner to specialist.

Per Earl Loreburn, Viscount Haldane and Lord Shaw of Dunfermline:—The facts of one case are hardly ever of any value when considering the facts of another case, and the same thing may be said in regard to the construction of one contract, which is rarely assisted by reference to the construction of other and different words. When the case goes upon the construction of a contract or upon a decision of fact, the main—and, broadly speaking the whole—value of a previous decision consists in looking at the point of view from which the learned Judge looks at the language, or looks at the evidence. The principle which must govern all similar cases must be taken and borne firmly in mind and in the light of that principle the contract in question must be read through.

Where under a building contract with a County Council the question was whether in employing a hot water engineer for the purposes of the contract the builder was acting as a principal or as the agent of the County Council and was liable for amounts payable to the engineer for work done by him and it appeared that the building was to be in accordance with the specifications and directions of the Council's architect for a lump sum, that the specification contained certain provisional items, including the following:—"Provide the sum of £ 450 for a low pressure heating apparatus"—, that the hot water engineer submitted a scheme to the architect and by the direction of the architect the scheme was accepted by the builder, and that during the progress of the work the engineer was paid by the builder a portion of the amount payable to him, *held* that the builder was the principal and that he, and not the County Council, was liable to the engineer.

Gray v. Lord Ashburton: (1917) A. C. 26.

Costs—Discretion of special tribunal established by Legislature and vested with the discretion—Interference by Courts—Principle—Distinction between such a case and case of discretion of judge of High Court—Court of appeal—Interference with discretion of Court below as to costs—Principle—Statute—Interpretation by analogy of other Acts—Propriety.

General words of discretion occurring in a statute which gives the commissioners or an arbitrator power to award costs are not to be cut down by importing limitations derived from the general law of England or any analogy between the position of an arbitrator and that of a judge. It is a case of a purely statutory proceeding and the Court cannot go outside the limits of the statute.

Where a statute provided that the costs of and incidental to an arbitration and award should be in the discretion of the arbitrator and that the arbitrator should, in awarding costs, take into consideration the reasonableness or the unreasonableness of the claim of either party, either in respect of amount or otherwise, *held* that, in the absence of an allegation of misconduct in a legal or any other sense against the arbitrator, his decision as to costs ought not to be interfered with.

Per Earl Loreburn:—There is nothing more to be deprecated than placing a gloss upon the quite simple language of an Act of Parliament by reference to other Acts which contain different language.

Per Viscount Haldane:—A Court of appeal will interfere and is always free to interfere with an order of the Court below as regards costs if it thinks that the trial judge has exercised his judicial discretion in a fashion that is not in accordance with settled principle.

Distinction between the case where a statute confers a discretion as regards costs on a special tribunal established by the legislature and the case of the discretion vested as regards the same matter in a judge of the High Court.

Admiralty Commissioners v. S. S. Amerika (1917) A. C. 38.

"Actio personalis etc"—Criticisms of—Observations on—Baker v. Bolton (1 Camp 493)—Decision that "in a Civil Court the death of a human being could not be complained of as an injury"—Origin

of rule—Correctness of—Damages—Mitigation—Duty of person injured—Voluntary payments made by injured person if can be recovered—House of Lords—Duty to administer Law as it finds.

The appeal arose out of an action for damage by collision instituted by the appellants, the commissioners for executing the office of Lord High Admiral of the United Kingdom, against the respondents, the owners of a steamship. The damage was alleged to have been caused by the respondent, steamship running into and sinking one of His Majesty's submarines. The appellants claimed as an item of damage the capitalized amount of the pensions payable by them to the relatives of the crew who were drowned as a result of the accident. Two points were argued before their Lordships (1) whether one person could under any circumstances recover damages for the death of another by reason of the negligence of a third party and (2) whether the particular damages claimed could be recovered. The decision of the first point depended upon the correctness or otherwise of the decision in *Baker* v. *Bolton* (1 Camp 493) to the effect that in a Civil Court the death of a human being could not be complained of as an injury. Their Lordships held that *Baker* v. *Bolton* was correctly decided and that the appellants' suit should be dismissed on that ground. On the 2nd point their Lordships held that the appellants were not entitled to recover the particular damages claimed because their grant did not form any part of the contract between the Admiralty and the seamen who were drowned and because the pensions might therefore have been granted or withheld at the discretion of the Admiralty.

Lords Parker and Sumner went further and held that even if the pensions had been granted pursuant to contract between the Admiralty and the deceased seamen the appellants could not have recovered the same.

Observations of Lords Parker and Sumner on the origin of the decision in *Baker* v. *Bolton.*

Per Earl Loreburn "When a rule has become inveterate from the earliest time, as this rule (rule in *Baker* v. *Bolton*) appears to have been it would be legislation pure and simple were we to disturb it."

Per Lord Parker: The House of Lords is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision.

No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased.

Per Lord Sumner: Observations on the criticisms of the maxim *actio personalis moritur cum persona.*

The Canton (1917) A. C. 102 J. C.

Privy Council—Special leave to appeal from order of President—Grant of—Conditions.

On a petition for special leave to appeal to His Majesty in Council from an order of the President of the Probate, Divorce, and Admiralty Division (in Prize), *held* that their Lordships could not advise an exercise of the prerogative unless they were of opinion that the Judge had proceeded on wrong principles, or had come to a conclusion which was obviously erroneous.

In re **Bede Steam Shipping Co. Ltd**: (1917) 1 Ch. 123.

Company—Directors—Transfer of Shares—Refusal to register—Arbitrary exercise of power—Interference by Court.

Under the Articles of Association of a registered Company, a registered holder was empowered to transfer all his shares subject to the power of the Directors to refuse to register transfers of shares if "in their opinion, it is contrary to the interests of the Company that the proposed transferee should be a member thereof."

Held, by *Lord Cozens-Hardy, M. R.* and *Warrington, L. J.*, *Scrutton, L. J.*, dissentiente, that the power so vested in the Directors, justified a refusal to register only on grounds personal to the proposed transferee. It did not justify refusal to register transfers of single shares or shares in small numbers because the Directors thought it undesirable to increase the number of shareholders or that the transferee was the mere nominee of the transferor, the transfer having been made with a view to increase the number of share-holders who would support him in a policy which the Directors disapproved.

In re **Fletcher**; **Reading** *v.* **Fletcher**: (1917) 1 Ch. 147.

Merger—Lease for a term—Assignment of in favour of reversioners in fee—Intention to keep the term alive—Interest—Duty—Subsequent conduct, evidence of, inadmissible.

Where certain persons being entitled to certain property as reversioners in fee, took an assignment of a lease for a term to which the property was already subject and about nine months later mortgaged the term and the reversion separately.

Held, by *Astbury*, J., That, in the absence of any proof that it was the reversioner's interest or duty to keep the term alive at the date of the assignment, the subsequent mortgage was inrelevant as to their intention at that date.

The mere fact that merger would operate to prevent the reversioners from dealing with the term and the reversion separately would not constitute an interest against merger within the authorities, and there was a merger of the term in the reversion.

Meggeson *v.* **Groves**; (1917) 1 Ch. 158.

Lease—Construction—Date from which tenancy commences.

Where a tenancy is granted " from " March 25, the term commences at midnight on March 25.

Ackland v. *Lutley* [1].

Sidebotham v. *Holland* [2] followed.

In re **Gliddon** : **Smith** v. **Gliddon** (1917) 1 Ch. 174.

Will—Construction—Bequest of "all my moneys"—Residuary personal estate

A testatrix by her will bequeathed to her brother and her niece " all my moneys to be equally divided between them " and to the niece, "all my household furniture and personal effects." At the date of the will the testatrix had 32 £ at her bank and was possessed of furniture and effects to the extent of 20 sh. She was also entitled to a moiety of a reversionary interest in certain investments amounting to 2,430 £ subject to a mortgage for 750 £.

Held that the testatrix had used the words " all my moneys" in their ordinary legal sense and that the gift of them did not constitute a residuary bequest of her personal estate so as to pass the reversionary interest.

JOTTINGS AND CUTTINGS.

Fallen Trees on Highways.—His Honour Judge Wheeler took what seems the natural and reasonable view in *Hudson* v. *Bray* of the duties which our law imposes on the occupier of premises near a highway; but on appeal the Divisional Court over-ruled him

1. (1839) 9 Ad. and E. 879. 2. (1895) 1 Q. B. 378.

(Dec. 12). A violent gale blew down a tree on land near a highway and caused it to lie across the road. The owner knew of the obstruction to the highway thus caused, but left the tree unattended and unlighted, with the result that a motor car ran into it at night and suffered damage. Now, the doctrine in *Fletcher* v. *Rylands* (L. R. 1, Ex. 280) which imposes the duty of keeping any dangerous thing at one's own peril if one brings it on one's land hardly applies to a tree growing in the ordinary course of nature; but if it does, still a violent gale is *vis major* and excuses the owner from liability. Thus the occupier of the premises is not liable for the quasi-trespass on the highway committed by his fallen tree. But if he, after notice, allows it to remain there, is he not guilty of obstructing the highway just as if he left his carriage unattended there? This seems plausible, but the answer seems to be that the Highways Act, 1835, contemplates the occurrence of such cases and provides a scheme of duties which ousts the common law. Under S. 25 of the Act it is the duty of the road authority to remove the obstruction, although under S. 65 steps may be taken to impose the cost of removal on the owner of the tree. Lastly, it is arguable that there is a common law duty on any owner of property on the highway to take reasonable care that it shall not injure the public at large; and here the reasonable thing was to place a light on the tree. This view His Honour took, and it is difficult to see any real answer to it. But the Divisional Court held that there can be no duty of this kind unless the owner of the tree has failed to remove or guard it after notice from the Surveyor of Highways, on the principle laid down in *Gully* v. *Smith* (12 Q. B. D. 121). In the opinion of that Court, therefore, the owner was absolved from liability for the injury to the car.—*The Law Journal, 13th December* 1916.

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Marriage and Expulsion Orders. The London Quarter Sessions quashed in *Rex* v. *Rance* (January 30) a magisterial conviction which took place in a rather exceptional set of circumstances The appellant was a German girl who omitted to register under the Aliens Restriction Order, with the result that a deportation order was made against her. Before the date fixed in the order expired she married an Englishman, and thereby acquired British nationality. Of course, there is no jurisdiction to make such an order against British subjects, and

she therefore treated the order as having been revoked by marriage. She was tried summarily for disobeying it, convicted, and sentenced to a term of imprisonment. This conviction Quarter Sessions upset on appeal, holding that on ceasing to be an alien the defendant was no longer bound to obey the order.—*The Law Journal, 3rd February* 1917.

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The Privilege of an Advocate. We hope the representative bodies of the profession, in England as well as Ireland, will carefully consider the decision of the Court-martial in Dublin, by which Mr. Moran, a Limerick solicitor, has been sentenced to six months' imprisonment for having, in defending a prisoner, published in open court, contrary, as it was alleged, to the Defence of the Realm Regulations, some confidential document issued by the Royal Irish Constabulary. It would seem that the original charge against Mr. Moran, which was that of refusing to disclose how he obtained the documents, was not persisted in. What, therefore, the finding of the Court-martial amounts to is that an advocate who makes use of a confidential document which he regards as relevant to the defence of a client against whom a criminal charge is brought is himself guilty of a criminal offence under the Defence of the Realm Regulations. That is a conclusion so contrary to the rules of justice and the traditions of the profession that it ought not to remain unchallenged. The privilege of an advocate is absolutely destroyed if he is not free to utilise a document that is relevant to the issue before the Court, and the interests of justice, on which alone that privilege is based, must inevitably suffer if such a restriction is imposed on the traditional rights of the advocate.

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Pleadings in Libel Actions. An important point in practice which has for some time been regarded as doubtful was settled by Mr. Justice Shearman last week in the libel action of *Smith* v. *Lewis* (February 2), in which the real issue between the parties was one of express malice, the question being whether this was raised by the pleadings. Following the usual form, the statement of claim alleged that the defendant had 'falsely and maliciously' written and published the words complained of; the defendant pleaded privileged occasion; and on this issue the case went to trial, no reply being delivered by the plaintiff. It was

contended for the defendant that the issue of express malice was not raised, the allegation in the statement of claim being merely formal. It is an old grievance with experienced pleaders that the worlds 'falsely and maliciously' should ever have been introduced into libel claims. 'Defamation,' says Mr. Spencer Bower in a note to his Code, 'is wrongful and actionable, just as trespass, assault, conversion or detinue is, unless and until any legal excuse is shown'; and why it should have been considered necessary to attach the meaningless epithet 'malicious' to a libel any more than to any other actionable wrong of which malice is not a necessary ingredient is to this learned writer 'beyond comprehension.' The use of the words, however, having become inveterate, judges have been accustomed to give effect to them in contested cases of privilege by not requiring any fresh averment of 'malice' but doubt has been thrown on this convenient practice by some who have been attached to the distinction between 'malice in law' and 'malice in fact.' Lord Justice Vaughan Williams gave his support to the maintenance of the distinction in pleading by his judgment in *Dawson* v. *Dover Chronicle* [1913], and the *Annual Practice* has been doubtful in its comments on the practice (compare the notes on pp. 364 and 419, Ed. 1917). Mr. Justice Shearman has now adopted the common-sense view that, there being an allegation of malice in the claim, and a plea to this of privilege, the issue was defined, 'because by the defence of privilege the allegation of malice in the statement of claim became not merely a nominal but an effective issue.' That ought to settle the practice.

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'Provisions' and Covenants. Any words in a lease which show an agreement to do a thing make a covenant, even though the words from which the intention to agree is inferred occur in some other provision or recital. But it must be clear that the words are meant to operate as an agreement, and not merely as words of condition or qualification, and in Comyn's Digest an instance is given of a covenant by a lessee to repair, 'provided that the lessee finds the timber,' as not creating a covenant by the lessor to find the timber. It has long been regarded as settled law that where the thing to be done precedes the obligation to perform a covenant by the lessee it should generally be construed only as a qualification of the lessee's covenant, but

where the thing to be done is to succeed the performance of the covenant it should be construed as an independent covenant by the lessor. So it has been laid down in Rolls' Abridgment, and in Viner, Bacon and the leading text books. But a valiant attempt to upset these authorities was made last week in *Westcott* v. *Hahn* (February 2) where the Divisional Court was asked to declare, on a special case stated under S. 19 of the Arbitrators Act, that an obligation on the part of a landlord of farm premises to supply material for repairs undertaken by the tenant at his own instance, was created by a covenant by the tenant 'from time to time during the term at his own cost (being allowed all necessary materials for this purpose, to be previously approved by the lessor) when and so often as need shall require to well and substantially repair' the farm buildings. The Court decided, after some hesitation (Coleridge, J., dissenting), that the intention here was not to create a covenant by the lessor, but only to impose a qualification on the lessee's covenant. The effect of the provision was in fact that the obligation to repair laid on the tenant could not be enforced unless and until the landlord himself provided the agreed materials, but that was not the same thing as putting an independent obligation on the landlord to be enforced at the tenant's instance. And so the case was remitted to the arbitrator with the opinion of the majority of the Court in favour of the landlord.—*The Law Journal, 10th February, 1917*.

CONTEMPORARY LEGAL LITERATURE.

A writer in the American Law Review (November-December) discussing the ways and means of improving the American judiciary without having recourse to the drastic remedy of "Judicial recall" states the following as the abuses in the Judicial System of America which have called forth the suggestion of that remedy, (i) Judicial corruption (not direct corruption but the indirect one of accepting favours from corporations such as free passes for railway journey &c.); (ii) bias in favour of certain interests, (iii) political bias (discretionary orders are obtained on occasions on account of this or that man appearing to whom the judge owes politically), (iv) judicial ignorance which is in a large measure responsible for appeals (v) discourtesy to the bar, (vi) the law's delay, (vii) Judicial misconduct in the trial of cases (due to confidence in their own judgment and the consequent attempt by all possible means to

make the jury return the verdict they think proper), (viii) abuse of Judicial discretion (on account of bias in favour of certain persons). In America some judges seem to be given to having secret conferences with attorneys of one side in the absence of the other side attorney. This he thinks should be avoided by all means if the judges care for their fair name. The class preferences can be avoided by taking care to select people with really judicial temperament. To avoid political judges, the remedy suggested is that the judges should be appointed by the executive subject to the approval of their state or local bar association and the appointment should be for a term. The judicial ignorance is due to the system of election which brings up occasionally people who are totally unfit. His suggestion to avoid delay is to cut short the number of appeals. He is for increasing the number of judges if necessary so as to ensure confidence and to give no more than one appeal one of the most essential things according to him is to keep the judges out of politics. Another writer considers the application of the Roman doctrine of *desuetudo* in the American Law that is to say the right of the judges to disregard a particular law as obsolete. At least one judge had the boldness to declare that a particular law had become obsolete and so to disregard it (the law in question was as to "benefit of the clergy.")

Another very interesting article deals with the German lawyers and German courts. The following are some of the peculiar features of that system. First, the judges are not recruited from the Bar. At the beginning of his career, a lawyer has to make up his mind whether to follow the judicial or the lawyer's career and he cannot change in the middle. The judges as a rule receive very low salaries. £ 300 is considered very good salary for very many judges. There is not the system of briefs or of short and concise pleadings. Pleadings are in fact like the opening speech of counsel. The trial is always by instalment. Preparation of cases is not left to counsel to anything like the same degree as under the English system. Before a subpoena is issued application must be made to the court and *prima facie* case of relevancy must be made out; if this is accomplished the points upon which it is proposed to have the witnesses examined must be formulated and submitted to the Court for approval. In the midst of the trial of a cause, such applications will be heard to the great detriment of orderly procedure. Under the German system, examination of witnesses

is entirely in the hands of the judge; there is no cross-examination by counsel. In the lower courts where petty cases are tried, pleaders are not allowed while the opposite rule prevails in the Higher Courts where parties can appear only by pleaders. In the history of German procedure, there was a period in which the experiment of entirely doing away with the lawyers was tried but being found to be a failure, the modern system was adopted. Pleaders have to produce powers of attorney before they can appear. A successful party gets all his costs from his adversary, not as under the English system only a portion of it; provided of course, they are not unreasonable. one peculiar feature connected with the Bar is that certain pleaders are attached to each court, and they alone can appear in that court; the pleaders of one court cannot appear in another. As a result, fancy retainers are not one generally possible.

In the *Harvard Law Review* for January, 1917 Mr. Roscoe Pound continues his discussion about "the end of law as developed in juristic thought." His present article is devoted to the developments in the 19th century. A characteristic juristic achievement of the 19th century according to him is the setting off of jurisprudence as a separate science and the idea of justice as the maximum of individual self assertion which begins to appear at the end of the sixteenth century reached its highest development. Whereas the main current of nineteenth century thought opposed society and individual and was troubled to reconcil Government and liberty, a new group of thinkers seek individual liberty through collective action and call for the maximum of Government control as the means of a maximum of liberty which mark the beginning of a transition to a new conception of the end of the law. In another article of interest, Professer Jeremiah Smith suggests a three-fold classification of obligations into (i) contract, (ii) tort, and (iii) absoulte liability instead of the customary division into contracts and torts and would restrict the term torts to cases where the liabillty is due to some fault.

SUPPLEMENT TO THE CALCUTTA WEEKLY NOTES : *Patna High Court cases.*

We bring to the Notice of our readers that a Supplement is issued to the Calcutta Weekly Notes giving the cases of the Patna High Court for which a small separate subscription is charged. As the Patna High Court has no separate law reports for itself practitioners must perforce have recourse to one or other non-official publication. Subscribers to the Calcutta Weekly Notes will find it cheaper to subscribe for the Supplement.

The Madras Law Journal.

PART XVI.] APRIL, 1917. [VOL. XXXII

LIMITATION AND PROOF OF POSSESSION IN EJECTMENT SUITS.

[Secretary of State for India *v.* Chelikani Rama Row : I. L. R. 39 M. 617. Kumar Basanta Kumar Roy *v.* Secretary of State for India : 32 M. L. J. 505.]

The decision of the Privy Council in *Secretary of State for India* v. *Chelikani Rama Rao*, [1] requires more than a passing notice, as to its bearing on a rule repeatedly laid down in several decisions of the Madras High Court. The proceedings related to the title to certain islands formed in the sea near the mouth of the Godaveri and the claimants had proved possession of the same for more than twenty years. Relying on the decisions in *Secretary of State for India* v. *Vira Rayan*, [2] *Secretary of State for India* v. *Bavothi Haji*, [3] *The Secretary of State for India* v. *Kota Bapanamma Garu* [4] the High Court held that "though the title was originally in the Crown still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation". The Judicial Committee in holding this view to be erroneous observe, "nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession, * * *. It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession." Their Lordships support this statement of the law by a reference to the decision of the Board in *Radha Gobind Roy* v. *Inglis* [5]; and with reference to the decision in *Secretary of State for India* v. *Vira Rayan* [2] they say, that the

1. (1916) I. L. R. 39 M. 617.
2. (1886) I. L. R 9 M. 175.
3. (1892) I. L. R. 15 M. 315.
4. (1896) I. L. R 19 M. 165.
5. (1880) 7 C. L. R. 364.

facts therein were essentially different and that the ratio of the decision there was found in the historical circumstance peculiar to Malabar, that in that District there is no presumption of state ownership of forest lands. With all respect, we cannot help remarking that this is, to say the least, a very unsatisfactory way of dealing with that case. Reference is no doubt made there to this peculiarity of land tenure in that district and it was not really a case in which the subject had to rely on a *title by prescription*. But the judgment of the High Court is not based on these considerations. The learned Judges attempt to lay down certain general principles and they begin the legal discussion with the following words:—" Assuming that even in Malabar the Crown had the right to oust any person who without its sanction occupied waste land, the question that presents itself for determination at the outset of this case is whether it is competent for the Crown by instituting a suit for a declaration of right or ejectment without specifying a date at which the cause of action arose, to compel a defendant to prove possession for 60 years."

Other decisions of the Madras High Court purporting to follow that in *Secretary of State for India* v. *Vira Rayan* [1] have not been specifically noticed in their Lordships' Judgment. The case in *The Secretary of State for India* v. *Bavotti Haji* [2], was also from Malabar and the question of possession was there material only as raising a *presumption of title* in the claimant. But in the judgment of Best, J., there are some observations touching rather indistinctly on the point of limitation; see also *Nawab Ajajuddin Khan* v. *Secretary of State for India* [3] and *Kambapati Venkatasubbiah* v. *Secretary of State for India* [4]. *The Secretary of State for India* v. *Kota-Bapanamma Garu* [5], was a case from the Godaveri District. There, the finding was against the Crown's title, and the claimant's possession was relied upon only as *prima facie* proof of ownership. But the court went on to add that in such a case Government " must show a *subsisting* title of its own " as contra, distinguished, evidently, from proof merely of antecedent title. This expression as to the obligation to prove a " subsisting title," is repeated in later cases, as well when there is no question of prescriptive title, as when there is one. Thus in *Krishna Iyer* v. *Secretary of State for India* [6], the plaintiff proved possession

1. (1886) I L R 9 M 175
2. (1892) I. L. R 15 M. 315.
3. (1904) I L R. 28 M. 69.
4. (1912) M. W. N. 881.
5. (1896) I L R. 19 M. 165.
6. (1909) I. L. R. 33 M. 173.

for 30 or 40 years. The title put forward by the Crown was held not established. And therefore the further question whether it was a "subsisting one" did not arise at all. In discussing the form of the declaration to be given, the learned Judges held that the long possession shown was sufficient to make out a title even against the Crown and in the course of the judgment, they repeat the rule that in the circumstances shown "the possession of the plaintiff throws upon the defendant the burden of proving that he has a subsisting title". In another case in the same volume *Venkatarama Iyer* v. *Secretary of State for India* the Court (without going into the question of anterior title) decided in favour of the plaintiff on the basis of a right acquired by adverse possession. They held that the adverse possession of the plaintiffs (against Government) for 30 or 40 years was "sufficient to shift to Government the onus of showing that Government has been in possession at some time within 60 years prior to the suit" and in the absence of any such proof "the plaintiff's possession should be presumed to have continued for more than the statutory period." In *Chelikani Rama Rao's Case* [2] the High Court went one step further when they applied the same rule even to a case in which the Crown had the *prima facie* title. It is obvious that the decision in *Venkatarama Iyer* v. *Secretary of State for India* [1], must be taken to be overruled by the decision of the P. C. in *Chelikani Rama Rao's Case* and the dicta in some of the cases referred to above will require reconsideration in the light of the pronouncement of the Judicial Committee. As for *Secretary of State for India* v. *Vira Rayan* [3], the statement as to the burden of proof "being the same as between private parties and the Crown where the existence of a subsisting title in the plaintiff is challenged by a plea of limitation" may be generally accepted, but the interpretation there put upon the decision in *Radha Gobind Roy's Case* can no longer be unreservedly adopted. The way that the learned Judges in that case attempt to reconcile the decision in *Radha Gobind Roy* v. *Inglis* [4] with that in *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nund Lall Singh* [5] is not in accord with later decisions of the Privy Council.

In Mr. Rustomji's book on Limitation there is a long and instructive note on some of the Privy Council decisions bearing

1. (1909) I. L. R. 3[illegible] M. 362. 2. (1908) I. L. R. 33 M. 1.
3. (1886) I. L. R. 9 M. 175. 4. (1880) 7 C. L. R. 364.
5. (1860) 8 M. I. A. 199.

on the question of onus of proof in such cases. But it has not dealt sufficiently with the Madras cases and certain of the observations of the learned writer with reference to some of these cases are not easy to follow. He endeavours to show that the Privy Council cases are all reconcilable if the distinction between those falling under Art. 142 and those coming under Art. 144 is borne in mind. While admitting the force of this distinction as a rough and ready test, we must however say that there are some observations of their Lordships which still create difficulty; and the learned author does not take sufficient notice of the fact that as late as 1899 (in the case in *Innasi Muthu Udayan* v. *Upakarath Udayan* [1]) the Privy Council recognised that even in a case where the question is one of adverse possession by the defendant, it might be possible to argue that "the mere fact of possession (by the defendant) for seven years before suit throws on the plaintiff the burden of showing, when that possession began." It has also to be borne in mind that more than one decision of the Indian High Courts have held that in *all* suits in ejectment, the onus lies upon the plaintiff to prove a subsisting title at the date of the institution of the suit, *Mirza Shamsher Bahadur* v. *Kunj Behari Lal* [2], *Inayat Husain* v. *Ali Husan* [3], *Nazhar Husain* v. *Bohari Singh* [4] and the same *general* language is employed by the Judicial committee in *Mohima Chunder Mozumdar* v. *Mohesh Chunder Neoghi* [5]. In the case in *Raj Kumar Roy* v. *Gobind Chunder Roy* [6], their Lordships refrain from examining the question and prefer to decide the case upon a certain assumption as to burden of proof; and in the latest case on the point *Kumar Basanta Kumar Roy* v. *Secretary of State* [7], in which all the earlier decisions seem to have been referred to in the course of the argument before their Lordships, the Board avoid making a definite pronouncement upon the question of burden of proof and rest their decision on the ground that the evidence in the case was 'sufficient to establish a clear conclusion of fact. As regards *Radha Gobind Roy* v. *Inglis* Mr. Rustomjee regards it as a case falling under the principle of Art. 144, but Dr. Mitra thinks otherwise and he considers both that case and that in *Innasi Muthu Udyan* v. *Upakarath Udayan* [1] to be 'exceptional' and not easily reconcilable with

1. (1899) I. L. R. 23 M. 10.
2. (1907) I. L. R. 7 C. L.J. at p. 420.
3. (1897) I. L. R. 20 A. 182.
4. (1906) I. L. R. 28 A. 760.
5. (1888) I. L. R. 16. C. 473 (P.C.)
6. (1892) I. L. R. 19 C. 660 (P. C.).
7. (1916) I. L. R. 32 M.L.J. 505.

decisions like those in *Maharaja Koomur Baboo Nitrasur Singh* v. *Baboo Nund Lall Singh* [1], *Rajah Saheb Prahlada Sing* v. *Maharajah Rajendar Kishore Singh* [2], *Mohima Chunder Moozumdar* v. *Mohina Chunder Neogi* [3].

Prior to the Limitation Act of 1871, there could have been no difference in this respect between one kind of ejectment suit and another; and it is the introduction of the doctrine of adverse possession as the residuary rule that has led to this differentiation. Whatever may be the difficulty in cases in which a person in possession raises the plea of limitation merely to bar the suit of another, there seems little reason to doubt that when a person out of possession (or whose possession is disturbed) seeks to recover possession (or sustain his possession) on the strength of a *title acquired by prescription*, it will be on him to make out *actual* possession for the full statutory term, *Udit Narain* v. *Golabchand*, [4] *Emmerson* v. *Maddison* [5]. The application of the rule of ' Continuance of possession ' or of ' presumitur retro ' to such a case is unwarranted; for *ex hypothesi* he was only a trespasser and it is well established that the law would make no *presumptions* in aid of his possession, *Secretary of State* v. *Krishnomoni Gupta* [6].

Analysing the several forms in which the question may arise, the following will be the principal classes of cases.

1. The simple case is that of a plaintiff who is unable to prove title, suing a defendant on the ground of dispossession, the defendant in turn, being also unable to prove any title. Here, of course possession on the one side or the other, is the only ground of title and plaintiff must clearly show that the dispossession complained of was within twelve years of suit.

2. The next case is that of a person with title and possession as well, dispossessed by a person without title. If the dispossessor is in possession and the true owner is obliged to sue in ejectment, the preponderance of authority is certainly in favour of the view that the plaintiff must prove his possession within twelve years before suit. If, however, the true owner somehow gets back into possession peaceably (or even by force, but no suit is brought within the time allowed by S. 9 of the Specific Relief Act) and the disseisor is obliged to go to court, the latter

1. (1860) 8 M. I. A. 199.
2. (1867) 12 M. I. A. at 337.
3. (1888) I. L. R. 16 C. 473.
4. (1899) I. L. R. 27 C. 221.
5. L. R. 1906 A. C. 569.
6. (1902) I. L. R. 29 C. 518.

if he proposes to rely on a prescriptive title, must show not only that he was in possession within 12 years before suit but also that he has, then had actual possession for the full statutory period. In dealing with cases falling under one or other of these two alternatives, certain rules of legal presumption acquire considerable importance, where the evidence as to possession is not clear or conclusive. The ordinary presumption that possession follows title is thus sometimes applied even when there is a question of limitation (cf. *Ranjeet Ram Pandey* v. *Goburdhun Ram Pandey* [1], *Rajkumar Roy* v. *Gobind Chunder Roy* [2], *Rani Hemanta Kumari* v. *Maharaja Jagadindra* [3]. So also the principles of contructive possession and continuity of possession; but these latter are applied only in aid of the true owner but not of the trespasser seeking to make out a title by prescription, *Secretary of State for India* v. *Krishnamani Gupta* [4].

3. The third class of cases are those in which plaintiff sues on the strength of his title without any reference to prior possession or dispossession. In such a case it would seem, that on the proper construction of Art. 144 the plaintiff would be entitled to succeed on proof of his title unless the defendant is able to displace it by proving adverse possession, by himself or his predecessor in title, for the full statutory term. But it is not always easy to decide whether any particular case really comes under Art. 142 or Art. 144, (cf. *Vasudeo Atmaram* v. *Eknath Balakrishna* [4], *Kumar Basant Kumar Roy* v. *Secretary of State for India* [5].

4. Where however the suit is not for possession but for a declaration or an injunction with reference to the title to or possession of land, articles 142 and 144 cannot directly apply and other considerations arise. If the plaintiff is able to prove his title it would seem that he is entitled to succeed. But where he is unable to prove his title and only shows possession, the question arises whether for the purpose of defeating him, the defendant has only to show anterior title at some time or a title subsisting at the date of suit. It may be said that the defendant should not be allowed to improve his position by seeking to disturb the plaintiff's possession, instead of regularly asserting his own right to recover possession.

1. (1873) 20 W. R. 25.
2. (1892) I. L. R. 19 C. 660.
3. (1906) 8 Bom. L. R. 400.
4. (1910) I. L. R. 35 B. 79.
5. (1917) 32 M. L. J. 505.

But there being no question of possession and dispossession in such a case, the Privy Council in *Chelikani Rama Rao's case* lay down that the test of Art. 144 would apply, that is, it would be sufficient if the defendant proves anterior title and if the plaintiff seeks to displace it by a prescriptive title "the onus of establishing possession for the requisite period would rest upon the plaintiff."

In the application of the principles stated above to proceedings under the Madras Forest Act, some difficulty is created by the scheme of that Act, practically imposing upon a claimant in afforestation proceedings, the burden of proving his title. If at the date of the initiation of proceedings the claimant is in possession, the case would under ordinary circumstances be governed by the analogy of Art. 142. But as the Act entitles the State to reserve any land at the disposal of the Government and as land which is *prima facie* the property of the State won't cease to be at the disposal of the Government by the mere fact of somebody being in possession unless that possession had continued for the statutory period, it would seem to follow that the person objecting to the reservation must show possession in himself for the statutory period. This is evidently the reason why their Lordships observe that "objectors to afforestation, preferring claims are in law in the same position as persons bringing a suit in an ordinary court of justice for a declaration of right". In this view the observations in *Secretary of State for India* v. *Bapanamma Garu* [1] in so far as they seem to apply even to property *prima facie* belonging or shown to belong to the State must be taken to be no longer good law. But the question of the effect of long possession by the party in throwing upon the Government the onus of proving that the land sought to be dealt with is land belonging to it or at its disposal must be carefully distinguished from that of proving a title by adverse possession (cf. *Haidar Khan* v. *Secretary of State* [2].)

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1. (1895) I. L. R. 19 M. 165. 2. (1908) I. L. R. 36 C. 1.

SUMMARY OF ENGLISH CASES.

Megaerditchian *v.* **Lightbound**: (1917) 1 K. B. 297.

Solicitor—Lien—Documents obtained by negotiation without litigation—Principle of solicitor's lien at common law.

The lien of a solicitor at common law was a charge enforced by the court in the cause, and its existence depended upon the power of the court to make the other party pay again if he paid direct to his adversary with notice of the attorney's claim. It did not rest, like a true lien, on possession at all. *Held*, therefore, that a solicitor had no lien upon the fruits of a mere negotiation conducted by him.

Horwood *v.* **Millar's Timber and Trading Co. Ltd**: (1917) 1 K. B. 305 C. A.

Restraint of Trade—Contract in—Test—Validity—Contract restraining contractor's liberty of action and property—Part of contract when enforceable—Future wages—Assignment—Effect.

In this case, the Court of Appeal unanimously declined to uphold a mortgage bond by which, in consideration of a sum of cash, the mortgagor in effect made himself the slave of the mortgagee. In the course of his judgment Lord Cozens-Hardy, M. R., observed : " If as a matter of construction I have come to the conclusion that the contract is one which puts the covenantor in the position of *adscriptus gleabae* on the ground of public policy the law will not recognise such a thing. No one has a right so to deal with a man's liberty of action as well as his property, and the law says it is contrary to public policy ".

Observations of *Warrington, L. J.*, on the effect of an assignment of one's future wages. All the members of the court relied upon and followed the observations of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (1913) A. C. 745 as to the circumstances under which part of a covenant in restraint of trade will be enforced even though the covenant taken as a whole exceeds what is reasonable.

Kirklinton v. **Wood**.—(1917) I. K. B. 332.

Lease—Construction—Covenant to do specific repairs in particular year if lease should then be subsisting — Provision in lease for termination thereof by lessee during currency of year on notice—Termination of lease by lessee during currency of year—Effect on obligation to perform covenant—Liability for damages for non-performance.

The question for decision in this case was whether, where a lease contained a covenant to execute specific repairs in a particular year, if the lease should then be subsisting, the lessee was relieved of his obligation to perform the covenant by the fact that he determined the lease by notice expiring before the end of the year. The lease in question provided that if the lessee should during the continuance of the term die and if his executors should give to the lessor six calendar months' notice to determine the lease on March 1st in any year of the term the demise should cease immediately after the expiration of the notice. The lessee died in 1915 and his executors gave six months' notice to the lessor to determine the lease on March 1, 1916 and omitted to perform the covenant. In an action for damages brought by the lessor on the determination of the term *held*, that the executors were liable because the obligation to perform the covenant attached to them as soon as the year commenced and because, though ordinarily they would have had the whole year to perform it, they placed it out of their power to do so by giving a notice expiring before the end of the year.

The question as to what would have happened if the lessor had given the notice was raised but not considered.

Healy v. Howlett: (1917) 1 K. B. 337.

Contract—Sale of goods—Appropriation—Passing of property—Conditions.

A entered into a contract with B for the sale of 20 boxes of a certain article, a term of the contract being that the boxes were to be sent to B at Station X. In pursuance of the contract A consigned by Railway 190 boxes of the article with instructions to the Railway Company at Station X to deliver 20 of the boxes to B and the remainder to two other purchasers. After placing the boxes on Rail A sent an invoice to B which stated " At sole risk of purchaser after putting boxes on Rail here." On arrival of the boxes at Station X an official of the Railway Company, in accordance with A's instructions, picked out and earmarked twenty boxes to B and the remainder to the other purchasers. The boxes earmarked for B were damaged because of the delay in their arrival, the article was not in a merchantable condition and B refused to accept the boxes. In

an action by A to recover the price of the boxes, two questions arose for decision (1) whether the property in the article passed to B; and (2) whether the article was at their risk after being placed on Rail by A. On the second question, *held*, that as the contract was complete before the invoice was sent to B and B had not assented to the condition on the invoice, the condition formed no part of the contract and the article was not at the risk of B. On the first question, *held*, that as there had been no appropriation of the twenty boxes by A when he put them on Rail and as delivery to the Railway Company of 190 boxes did not pass the property in any particular twenty boxes to B, the property in them did not pass to B; he was not bound by the selection of the Railway Official; and, as the article was damaged, he was not bound to accept it and A could not recover the price.

Per Ridley, J: The essence of the authorities which decide that appropriation of goods to the contract by delivery to the carrier at the beginning of the transit may be sufficient to pass the property is that it should be known to whom the goods are appropriated, and not that the question as to who is to bear any loss that may happen should be open to any discussion or be determined by accident.

The goods become the property of the consignee and are at his risk so soon as they are marked off by some distinct act as his, and not the seller's and are delivered to the carrier as the agent to complete delivery to the purchaser.

Hurst v. Evans: (1917) I. K. B. 352.

Insurance Policy—Liability under—Exemption in cases of loss by theft or dishonesty of servant in exclusive employment of assured—Proof of inaction on policy—Onus—Quantum—Civil and Criminal Cases—Sufficiency and admissibility of evidence—Distinction.

Where by a policy of insurance underwriters insured the assured, a jeweller, against loss of or damage to jewellery arising from any cause whatsoever save and except breakage and save and except loss by theft or dishonesty of any servant in the exclusive employment of the assured, *held*, in an action upon the policy by the assured against one of the underwriters, (1) that the onus was on the plaintiff to allege facts to show that the lost goods were covered by the policy, that the loss was one against which

the defendant had agreed to indemnify the plaintiff and therefore that the goods were lost by theft by some person other than a servant in his exclusive employment, and (2) that even if the onus was on the defendant to prove a theft by the plaintiff's servant, the evidence need not be such as would be sufficient to convict the servant in a criminal prosecution.

Observations on the distinction between the sufficiency and admissibility of evidence in a civil case and in a criminal case arising out of the same matter.

The King *v.* Naguib: (1917) 1 K. B. 359.

Criminal Law—Bigamy—Indictment for—Plea of invalidity of earlier marriage on ground of a prior foreign marriage—Proof of foreign marriage.—Nature of evidence required—Foreign marriage according to law permitting polygamy—Validity in England.

Where a person, who was an Egyptian by birth and a Mahomedan by religion but was not specially conversant with the laws of Egypt, was indicted for marrying a woman in England during the lifetime of another whom he had also married in England and pleaded the invalidity of the first marriage on the ground that he had prior thereto married an Egyptian woman according to the Mahomedan religious law, *held* that it was incumbent on the prisoner to establish the marriage in Egypt by the evidence of some person conversant with the marriage laws of Egypt and that the evidence of the prisoner himself of the performance of a ceremony was not enough.

Quaere whether an Egyptian marriage according to the Mahomedan religious law which permits polygamy will be regarded in England as a marriage.

Macmillan *v.* London Joint Stock Bank, Ld.: (1917) 1 K. B. 363.

Banker and customer—Duty of customer—Forged cheque—Alteration of amount—Payment by bank—Customer's suit to recover amount of cheque—Maintainability—Liability of banker—Negligence of customer—What constitutes.

The relationship of banker and customer creates a duty owing by the customer to the banker. Apart from contract or course of dealing between the parties, the duty is that the customer must take reasonable care not to mislead the bank. For negligence in discharge of that duty the customer may be held responsible,

But the negligence must be negligence in, or reasonably connected with, the transaction itself. The question as to what constitutes negligence is one of fact to be arrived at by a consideration of the surrounding circumstances. When the only negligence suggested against the customer is the fact that he has given an opportunity for a clerk to commit forgery, such negligence is not sufficient to make the customer liable. *Quaere* whether a customer is ever liable in a case of an altered cheque unless he has by some contemporaneous or subsequent act or document misled the bank into paying on it.

The action was to recover a sum of 235£ which plaintiffs alleged had been paid by the defendant bank out of their account on a forged cheque. The cheque in question was one which was not entirely forged but which after signature had been altered and raised to a greater account than that for which it was intended to be drawn. The trial judge found as a fact that the plaintiffs were not guilty of any negligence which misled the bank and that if they were guilty of any negligence it was not negligence which caused the loss. The plaintiffs trusted a clerk whom they had no reason to suspect and the clerk made the said alterations.- *Held* that, in the circumstances of the case, the plaintiffs were not disentitled to recover the amount of the cheque.

Neville v. London Express Newspapers, Ltd.: (1917) 1 K. B. 402.

Maintenance of suit—Action of—Onus on Plaintiff—Proof—Quantum—Maintained action successful—Effect—Damages, measure of.

A plaintiff in order to succeed in an action of maintenance must prove not only that the defendant has assisted in the bringing of the suit but that he has done so without lawful justification or excuse. It is not correct to say that the action must fail unless the defendants had no reasonable or probable cause for believing in the rights of the plaintiffs in the Chancey actions. The plaintiff is entitled to recover damages notwithstanding that in the Chancery actions against him the plaintiffs were successful. With regard to the amount of damages, the plaintiff is entitled to the costs incurred by him in defending the Chancery actions as between solicitor and client and also the costs as between party and party which he was ordered to pay to the plaintiffs in those actions.

An action for maintenance will lie against a limited company.

JOTTINGS AND CUTTINGS.

The Court of Cassation :—A standard authority thus defines the powers of the Court of Cassation.

A supreme tribunal whose duty to annul or to affirm the decision of the intermediate Appellate Courts. The court was originally instituted under the title Tribunal de Cassation by decree in 1790, and by another decree, 28th floreal an. XII, it received its present title, Court de Cassation. The court consists of forty-nine judges—a first president, three presidents of chambers, the senior of the forty-five remaining judges being known as the doyen. The Court of Cassation has its own bar, consisting of sixty members, veritables officiers ministeriels, who act both as avoues and avocats.

Judges are generally chosen from among the first president and procurators-general of the various courts of appeal, the presidents of the Chamber of Paris, professors in the law faculties of the universities, high officials of the ministry of Justice, and from the avocats practising before the Court of Cassation.

In audiences solennelles the judges wear red robes over a gown (simarre) of black silk, a ceinture of red moire relieved with gold, and a toque of black velvet, also relieved with gold. On ordinary occasions a robe of black silk is worn. On high occasions the presidents wear ermine over their robes. The court sits in Paris, sometimes in camera, such sittings being generally connected with disciplinary measures :—50, *American Law Review.*

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Lawyers at the Imperial Conference:—How large a part lawyers take in the government of the Empire will be signally shown at the Imperial Conference. All the dominions, with the single exception of New Zealand, will be represented by lawyers, Australia by Mr. W. M. Hughes and Sir W. H. Irvine; Canada by Sir Robert Borden; Newfoundland by Sir Edward Morris; South Africa by General Smuts; and India by Sir S. P. Sinha. Of the fourteen Colonial and Indian statesmen who will attend the Conference, six, therefore, are men practised in the law. The Conference, which will, of course, be presided over by Mr. Llyod George, will be an unexampled demonstration of the

great part now played by the lawyer in politics.—*Law Journal, 24th February 1917.*

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Women as Solicitors:—Undeterred by the overwhelming defeat of the recent attempts to secure an expression of professional opinion in favour of the admission of women to the legal profession, Lord Buckmaster has introduced into the House of Lords a Bill to enable women to practise as solicitors. The operative clause of the Bill runs:—

A woman shall not be disqualified by sex or marriage for being admitted as a solicitor or for acting or practising as a solicitor under the Solicitors Act, 1843, and the Acts amending the same, and the other enactments for the time being in force relating to solicitors.

Lord Buckmaster, when he moves the second reading of his Bill, will find it difficult to resist the contention, made so effectively both in the Inner Temple Hall and the Law Society's Hall, that the proposal is untimely. Both branches of the profession have made it clear that they do not favour the proposal. There is no public demand for it. Even if it could be shown that the war had so diminished the ranks of practising solicitors that there were not enough men to do the legal work of the country, the ex-Lord Chancellor could hardly claim that his bill comes within the category of emergency legislation. No woman could practise as a solicitor until she had spent at least three years in becoming qualified. There are many men, no doubt, whose opinions on the admission of women to the legal profession have been affected by the large and the useful part which women are now playing in affairs of national importance. We shall be surprised, however, if the House of Lords does not adopt the view that it would be unbecoming to make any fundamental change in the membership of either branch of the legal profession while all its younger members are fighting in their country's cause. *Ibid.*

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The Exclusion of the Lawyer:—For some time past there has been a tendency on the part of Government Departments to eliminate the lawyer —'eliminate' used to be the favourite phrase —even from enquiries of a semi-judicial kind. Another instance

of this tendency is afforded by a circular which as recently been issued by the War Pensions Statutory Committee, stating that certain Advisory Wages Boards have been constituted by the Board of Trade to deal with the question of the wages to be paid to disabled soldiers and sailors employed by the Government, and intimating that any ex-soldier or sailor whose case is being considered by a Wages Board may be represented by any person *not* being a solicitor or barrister. From the professional point of view, no objection can be raised to non-legal persons being given a right of audience before such a body. It is not unreasonable in inquiries of this character that a man should be represented by any person who, in his judgment, is competent to give him the assistance he needs. The exclusion of the lawyer is to be condemned precisely because it violates this reasonable rule. An ex-soldier or sailor, whose case presents features of unusual difficulty, may have no friend who is capable of putting it properly before the Board. Why should he be unable to make use of the professional help which is at his disposal? All these restrictions, indeed, are calculated to produce hardship in a certain number of cases and ought to be protested against on public even more than on professional grounds.

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Women as Solicitors:—Lord Buckmaster has succeeded in inducing the House of Lords to give a second reading to his Bill for the admission of women as solicitors. Apart from the ex-Lord Chancellor, the Law Lords who spoke on the Bill were equally divided in opinion, Earl Loreburn and Lord Sumner supporting it, and Lord Finlay and Lord Halsbury opposing it. Even if the Bill passes its final stages in the House of Lords it is highly improbable, we imagine, that the House of Commons will have either the time or the inclination to discuss it. That House has strictly confined its legislative activities to matters directly connected with the war, and even Lord Buckmaster was obliged to admit that his bill could not be classified as an emergency measure. No attempt was made by the supporters of the Bill to deal with the reasonable view of the Law Society to which the Lord Chancellor gave the weight of his authority that, in the absence of so many young solicitors on military service, it would be unseemly to make any fundamental charge in the conditions on which the profession can be joined,

Lord Buckmaster suggested that the attitude of the Law Society has been prompted by a narrow feeling of trade unionism. It has, on the contrary, been inspired by an obvious feeling of fairness to the thousands of young solicitors and articled clerks who have responded—nearly all of them voluntarily—to the nation's call. Lord Sumner chose to treat the question as merely involving the fitness of educated women to 'prepare a will, a marriage settlement, or an affidavit.' He forgot that women, if they were admitted as solicitors, would be qualified to practise as advocates in the County Courts, and to oppose members of the Bar there. That, indeed, is one of the chief reasons why it is so undesirable and impracticable to propose the admission of women to one branch of the profession without considering, at the same time, their claims to practise in the other.—*Law Journal, March 3.*

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Miscellany:—Although I have had to reject—with success in at least one instance—the 'judgments', in peerage cases, of some former Lord Chancellors, it may seem rash to take the field against ten at once. But when Lord Buckmaster asserts in the House of Lords that 'at one time a woman sat on the woolsack, but, possibly through lack of legal training, administered a wholly unprecedented form of justice,' and when Lord Halsbury admits that it was true that a woman had sat on the woolsack, but she had to adjourn the proceedings and go away, in order to become the mother of Edward I,' one may really be excused for stating the facts, though to lawyers, I fear, they are much less interesting than the things they read in books. When Henry III left for Gascony in July 1253, he made his Queen Regent of the realm with his brother Richard as her colleague. In May 1254, the Queen herself left to join the King in Gascony. Between these dates, on September 9, 1253, pleas were heard, apparently at the Exchequer, 'Coram Domina Regina et consilio Domini Regis', the queen acting, in the words of Maddox, *vice regis*, that is, as regent. That she acted judicially, either as Chancellor or as Keeper of the Seal, is a pleasant fiction for which, I believe, we have to thank yet another Lord Chancellor, namely, Lord Campbell. Both the learned Lords have yet, I gather, to discover that the Chancery in 1253 was not a Court of Justice and neither heard nor determined causes. The City of London's

'mutiny' against Queen Eleanor, which according to Lord Buckmaster, was provoked by her strange law, took place 10 years later, and the birth of Edward I.—though Sibyl Giffard acted as midwife on that occasion—took place, it may surprise Lord Halsbury to learn, in 1239, not in 1253. The woman Chancellor, it will have been seen, may take her place with 'Pope Joan' among the curiosities of history.—*Law Journal.*

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The French Court of appeal has quashed the conviction of a wife for sheltering her husband who had deserted from the Army. The reasons seem to have been that she was not entitled by law to prevent her husband entering and staying in his own house, that she was under a legal obligation to remain in the conjugal home, that she had not instigated the desertion, and that it would be unfair to expect her to perform her civil duty of denouncing the deserter.—*The Law Student Journal.*

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The following Will, omitting formal parts, has recently been proved:—

'Tis said in holy psalm that men decay,
When decades seven of years have passed away,
And age that runs beyond this wonted span,
Brings little of delight to lingering men.
As years full sixty-four, alas! have gone,
Since I this earthly scene first looked upon,
The time, I trow, will soon arrive when I
To this surprising world shall say, Good-bye!
So, where my mind remains quite sound and clear,
My will shall be distinctly stated here.
I give my wife, when life I leave behind,
My property of every sort and kind;
A further point I also duly fix—
I make my wife my sole executrix;
But, if she will, she may to those who have been
Faithful to me through any crucial scene
Some to ken give from my possessions small
Which me to their remembrance shall recall.
My body, when it seems of life bereft,
I wish examined by a Doctor deft;
Let him determine by some test well-known

That I am just as dead as any stone.
I care not, 'ere the vital spark has fled,
To make a close acquaintance with the dead.
No mourning garments need for me be worn
When I set out for "undiscovered bourne."
But this does not imply I do not prize
The tear which gathers in affection's eyes.

Ibid.

CONTEMPORARY LEGAL LITERATURE.

In *the Juridical Review for December*, Mr. Holdsworth gives an interesting sketch of the Early History of Commercial Societies in England down to the passing of the Bubble Act of 1720. He treats the subject under three heads (i) Early forms of commercial associations, (ii) the application of corporate idea to commercial societies, (iii) the commercial companies and partnerships of the seventeenth century. The two early forms of commercial association which have left their traces upon the later law are (a) the gild (b) and the mediæval contract of partnership. The gild was a sort of brotherhood. Membership came by birth or apprentice-ship and the members had to take the oath of fidelity. They were penalised if they did not attend the meetings. On fixed occasions they had feasts. We see these features in the early trading companies, for instance in the East India Company. More exclusively commercial influences come from the mediaeval contract of partnership. The first of these partnerships was the *commenda*, the second *societas*. The *commenda* was an arrangement under which a partner at home advanced money for a venture carried out abroad by the other partner. It was one of the devices adopted for avoiding the usury law. This form did not take root in England; it had greater vogue on the continent and has been revived in England in the Act of 1907. *Societas* was a more permanent association than *commenda*. From its permanent solidarity the law partially gave the following attributes to it (a) that each partner represented others (b) that each was personally liable without any limitation to all the creditors of the firm. The Scotch and continental jurists imputed legal personality though the English Law stopped short of it by reason of the introduction of Joint Stock Companies.

Before the beginning of the sixteenth century English Law had acquired some knowledge of corporate personality and during the 16th and 17th centuries considerable progress was made in the development of the law and the advantages of the system, especially in relation to foreign trade were soon felt and led to its large adoption. It was, however, in the seventeenth century with the rise of the Joint Stock Company formed to conduct jointly some specific trade that the commercial advantages of incorporation began clearly to appear.

Its advantages were (i) perpetual existence, (ii) facility in taking legal proceedings, (iii) even against its own members, (iv) possession of common seal to authenticate common transactions, (v) continuity of management, (vi) management by majority, (vii) transferability of shares, and (viii) Limitation of liability. The creditors had no right of direct recourse against the member but by what was called *leviation*, the creditor could reach the members by compelling them to pay their dues to the company. The Bubble Company led to declaring the Joint Stock Companies illegal unless they were duly incorporated by statute or charter.

Another interesting article in the same journal deals with the divorce statistics and some of the reforms recently suggested in the divorce law. Divorces seem to be largest in the United States of America. It appears partly due to the modern spirit in America to the composite character of its population, their reluctance to be bound by the past, and the vague search after a new and ideal state of society. Roman Catholicism operates strongly against, in fact all Church influences are against divorce though they do not all operate equally strongly. These divorces seem to be largest before child birth and in early years of married life. The new theory of marriage dissoluble at will is having some influence.

"The ministerial function of Govt." is the heading of another article of general interest. The ministerial function of the state is according to the writer invested with four distinct capacities:

(i) In active capacity carrying out the duties of the Govt.

(ii) In a passive capacity as legal status of Government.

(iii) In a proprietary capacity as receiving, holding, and transfering Crown property and revenues.

(iv) In all its dignity, prestige or reputation involved in the dea of the *Crown*.

In the Harvard Law Review for February a succinct history of Spanish Law and its component elements is given by Mr. Hamilton. The law of Spain in its finished form controls the civil relations not only of the Peninsula but of Central and South American countries, of Porto Rico and the Phillipines. Even to Americans, it is second in importance only to the common law. It is not a mere copy of the Code Napoleon. It is said to be more logical than the French Code. Provision is made for the growth of the law by the rule that if a new case arises, it must be decided according to natural equity. In this law, we find on a Roman foundation Gothic, Moslem, local and maritime elements which nevertheless make up a harmonious whole being the outgrowth of Spanish History. The peculiar contribution by the Moorish law seems to be what is known as conciliation that is to say an attempt at adjustment by the Court before actual trial commences.

The Roman law which forms the basis of the Spanish law is not the Justinian Code but the earlier Roman law. The family law has much of the Germanic element in it.

Mr. Jeremiah Smith continues his discussion about the reclassification of torts. Though in most of the named torts there is the element of fault that is to say wrong intention or culpable inadvertence even there there are exceptional instances of absolute liability. In defamation though fault is generally present, it is not an essential requisite. Similarly in the case of slander of title against strangers. Trespass is according to the writer not an exception. Cases of absolute liability in the absence of fault, which heretofore have been classified as torts may be divided into 3 classes:

1. Liability for culpable mistake.
2. Liability for non-culpable accident.
3. Vicarious liability for the wrongful acts of others. The liability of master for servant's acts comes under the last. It is stated by Professor Salmond that non-culpable mistake is no defence to civil liability. The writer controverts this position and says that this is true only of mistakes as to title to land.

In the case of non-culpable accident the general rule is that there is no liability but there are some so-called cases of extra-hazardous user where a man is said to act at his peril. These are survivals of the time when all a man's acts were done at

his peril. The following are some prominent instances of these:

1. absolute liability of the owner of certain animals for damage done by straying into another's land ;

2. in the case of blasting when substances are thrown on the land of the plaintiff;

3. for excavating in one's own land with the result of subsidence in the surface of another's land ;

4. for defamatory statements published on unprivileged occasions and not justifiable on ground of truth ;

5. in the action of slander of title against strangers.

As to the following whether there is an absolute liability in those cases also there has been much discussion : (i) Use of fire, (ii) manufacture and storage of dangerous explosives, (iii) collecting and keeping water in a reservoir.

Under the American Law, the rule of non-liability in the absence of negligence is applied to the use of fire for mechanical or manufacturing purposes as to all ordinary domestic or agricultural purposes.

As to (ii) no definite rule is yet established.

As to (iii) the American authority for non-liability is the English Law for liability. Exceptions have however been recognised to *Rylands* v. *Fletcher* even under the English law.

"Voluntary transfers of corporate undertakings" is the ubject of discussion in another article. The discussion centres largely round the question as to how far a corporation has power to dissolve itself. The common law rule was that a corporation could not dissolve itself by its voluntary action but it could surrender its franchise to the Crown and if the Crown accepted it, dissolution would result. The majority could resolve to surrender the charter and unanimous consent was not necessary. Corporations brought into being by a special statute could ordinarily be dissolved only by statute. In England an Act of Parliament dissolving a corporation is effective without more ; in America, till the statute is accepted by the corporation it has no effect. Even here, after a discussion of the authorities the writer comes to the conclusion that the majority has the power to consent to a dissolution.

A writer in *the American Law Review* calls upon the university Law Professors to define and promulgate principles as to the status of legal precedent and as to the policy and technique

of legislation and not be as they have been mere recorders and systematisers of the law. According to him, the chief defects in the American legal system are (i) its inability to adapt itself to changing standards of public policy, (ii) its procedural vices, (iii) its obstructive rule of evidence. The common law was conceived at a time when there were none of the social and economic complications of the present day and is therefore largely unsuited to the modern conditions.

The rule of *stare decisis* makes it difficult to progress though there is authority for the position that that rule does not require standing by a decision even after it has become manifestly inexpedient. He pleads therefore for the rationalisation of the doctrine and a socialisation of legal thinking. The writer's observations about the English common law, its jury system and the rules of evidence are far from being Complimentary.

Distinguishing nominal damages from small compensatory damages another writer in the same journal says that while the latter are really compensatory, the former are not damages at all; they exist only in name and not in fact.

BOOK REVIEWS.

A DIGEST OF ENGLISH CIVIL LAW, *by Edward Jenks, M. A., B. C. L. Book V., Succession (contd), Sections II and III Butterworth and Co., London, 1917.*

With this part, the work begun more than twelve years ago, is completed; and we can well appreciate the satisfaction of the editor at having brought his task to a successful termination. It is interesting to recall at the present moment that the work was undertaken at the instance of the Berlin Society for Comparative Jurisprudence, and in fact, the first part of it was published in Germany even before it appeared in England. Few persons who have followed the publication of the work through its several stages can fail to realise the difficulty and magnitude of the task or to appreciate the care and thoroughness with which it has been executed. All may not see eye to eye with the editor, when he claims that the English Law has become a system of world-wide influence "not by force of arms but by willing adoption," but whatever the reason may be, there is no denying its importance at the present day, nor are we disposed to ignore the intrinsic

merits of several parts of the system. In the very nature of things a work like the present can scarcely become a popular hand-book, but that certainly does not detract from its utility in the long run.

The present part deals with the law of Intestate Succession and the principles governing the administration of the estate of a deceased person. As observed by Mr. Colebrooke more than a century ago, " the law of Inheritance constitutes that part of any national system of laws which is most peculiar and distinct" and the peculiarities of English Law are nowhere better seen than in its system of intestate succession to real property. The sections of the present work dealing with that branch of the law are therefore of little more than academic interest in places where the English Law of Succession does not directly apply; but the latter half of the book dealing with "administration of assets" will be found both instructive and useful in this country where the law relating to executors and administrators is substantially based on the English rules. This section is arranged under eight headings dealing respectively with the following heads :—

I. The Personal Representative.

II. The Title and Interest of the Personal Representative.

III. Rights and Liabilities Passing to the Personal Representative.

IV. Assets.

V. The order in which debts are payable.

VI. The order of Resort to Assets.

VII. Duties and powers of the Personal Representative.

VIII. Personal Rights and Liabilities of the Representative.

In respect of a work so carefully and thoroughly done, it is scarcely possible to say anything in the nature of criticism in such a brief review. We cordially commend the book to the profession and to all interested in the study of law.

THE CURRENT STATUTES, 1916.—*First and Second quarters. Published by the Law Printing House, Madras.*

We have great pleasure in announcing the publication of the Current Statutes first and second quarters for the year 1916.

This volume, as the profession is aware, collects together all the Parliamentary enactments and Orders in Council relating to India, the Acts passed by the Imperial and local legislatures in India and the important notifications, rules and orders made under them. We need not repeat what all we said in reviewing the prior volume of this Series; but we must say that the present volume maintains the same high level of usefulness as its predecessors.

SANJIVA RAU'S *Code of Criminal Procedure in 2 Volumes, 2nd Edition. 1917. Law Printing House, Madras.*"

The first Edition of this book appeared in the year 1910 and with the year 1914 the Edition had been sold out and the profession has been eagerly looking for the present Edition. The volumes under review follow the same method of treatment as the Lawyer's Companion Series publications which are found very useful by busy practitioners as books of ready reference. The cases are given down to the end of 1916, under appropriate headings under each section. We have very great pleasure in recommending this publication to all who are connected with the administration of Criminal Justice in this country.

The Madras Law Journal.

PART XVII.] MAY, 1917. [VOL. XXXII

J. D. MAYNE.

The Madras Law Journal ought not to pass over in silence the death of John Dawson Mayne. It is true that he left India forty-five years ago, but he has left his works behind and they are not likely to be forgotten. Called to the Bar in 1854 he remained in England two or three years during which time he wrote the book on Damages which still survives. He appeared in Madras first in the capacity of a Professor of Moral Philosophy at the Presidency College, but that post he soon gave up in favour of practice at the Bar, which then of course meant the bar of the Supreme Court. In course of time he was appointed Crown Prosecutor and also Secretary in the Legislative department. In the latter capacity he was employed in the drafting of bills. Later on, on the retirement of J. B. Norton, he acted as Advocate-General. It is a mistake to suppose that he was, as described in the "Times," Administrator-General. As an Advocate it is pretty safe to say that he had not and never has had a rival in Madras. Even at the Bar of the Judicial Committee he had for at least ten years a unique position as an Advocate and as an expert in Indian Law and Hindu Law in particular. Of his work in India the record will be found in the eight volumes of the High Court Reports, in his Commentary on the Penal Code and his book on Hindu Law which however did not appear till six years after he left India. As the reports show, he could not have chosen a better time for his sojourn in the country. The Bar was comparatively weak in those days and the spirit of litigiousness among the big Zemindars was strong. The result was that by the end of 1872 he was in a position to return to England and take his chance at the bar of the Judicial Committee. He came home with a portmanteau full of retainers and the materials for his Hindu Law. To estimate the value of that work it must be remembered that in those days nothing of the kind had been attempted before. Strange's Hindu Law, Strange's Manual, and Norton's Leading Cases were about the only books other than the Texts of Commentators which a lawyer had to consult. There were no records of customs and but few Judicial decisions. It was an ambitious task which Mayne undertook when he set to work

not merely to expound Hindu Law as it was, but to explain how it came to be what it was. The lawyers of the present day ought to be grateful to him. They may criticize him and point out mistakes but they cannot get away from the fact that he helped materially to make Hindu Law what it now is. He made it in the sense that judicial decisions make law, namely, by making it intelligible.

Apart from law Mayne was a remarkable man. I remember hearing glowing accounts of his orations at Pachiyappa's school, and from personal knowledge I can speak of his wit and conversational powers. He had all the charm of a man who is full of life and of the joy of life. Even in his last photograph, which he sent me one Christmas two or three years ago, you see the vivid intelligence and alertness which distinguished him when I first knew him in the prime of his life.

H. H. SHEPHARD.

BOOK REVIEW.

THE INDIAN PENAL CODE (WITH CASE LAW). *By D. R. Sawhny (1916).*

This volume does not profess to be a treatise on the Law of Crimes like the well-known treatises of Mayne, Ratanlal or even of Nelson. It is intended purely as a book of ready reference to be taken with a lawyer when he has to practice before Magistrates who dispose of cases while in tour where it will be difficult to carry the reports themselves. The Magistrate will also find the volume of great assistance to him for the same reason. Under the sections the author gives a short statement of the facts of each case and the decision thereon. We would however suggest that when the author brings out a second edition of this book, he would group the cases under each section under appropriate headings so as to attract the attention of the practitioners easily. We would desire the introduction of some such system as has been adopted in the Lawyer's Companion series published at the Law Printing House, Madras. We must be grateful to the author for the trouble he has bestowed in examining the large mass of caselaw and giving a clear epitome of the facts of each case. We gladly recommend this volume for the use of every one that has to do with the administration of criminal law in India.

[End of Vol. 32.]

The Madras Law Journal.

PART I.] JANUARY 1917. [VOL. XXXII.

NOTES OF INDIAN CASES.

Bhupendra Kumar Chakravarti *v.* **Purna Chandra Bose**: I. L. R. 43 C. 650.

Mohan Lal Nagji *v.* **Bai Kashi**: I. L. R. 40 B. 477.

The provisions of the Court Fees Act allowing a plaintiff to put his own valuation on certain classes of suits have given rise to several questions on which judicial opinion is markedly divided. One is as to the power of the court to check the plaintiff's valuation. Another relates to the jurisdiction of the court to pass a decree in such cases for an amount exceeding the limits of its pecuniary jurisdiction as prescribed by law for purposes of 'institution'. A further question, closely connected with the previous one, is as to the right or forum of appeal in such cases, *viz*, whether that is to be decided with reference to the valuation in the plaint, or the limits of jurisdiction of the court in which the suit was instituted or the amount at which the plaintiff's claim is fixed as a result of the investigation in the suit. The Calcutta case noted above (decided in 1910, though reported only in 1916) arose out of a claim for mesne profits; and the learned judges there lay down two propositions (i) that as regards claims which have accrued at the date of suit and in respect of which the plaintiff is bound to state his valuation in the plaint, he must; by choosing a particular court, be deemed to have limited his claim to the maximum amount for which that court can entertain a suit, (ii) that as regards claims accruing after suit, though awardable by the decree therein, *e. g.* a claim for future mesne profits, the plaintiff should not be held to have waived or lost his right to claim an amount in excess of the limits of the court's jurisdiction but that in such cases the court should return the plaint, *in respect of that part of the suit,* for presentation to the proper court.

In the Bombay case (noted at the top) the suit had been brought for a declaration and an injunction and the question

arose with reference to the right of the plaintiff to appeal to the Privy council, on the ground that the subject-matter of the suit was worth more than Rs. 10,000, though for purposes of Court Fees and Jurisdiction he had valued the suit at Rs. 135. The learned Judges base their decision on the second paragraph of S. 110, C.P.C., *i.e*, on the ground that the case *indirectly* affects property of the value of Rs. 10,000 and to this we can see no exception. But the earlier decision in *Hirjibhai's case* [1], which they distinguish as one falling under the first clause of S. 110, substantially followed the Calcutta view and the learned Judges who decided the later case seem also prepared to adopt that view.

The Allahabad and Madras High Courts take a different view though even as between them, there are differences of opinion on certain points of detail. The considerations properly applicable to the decision of these questions and the flaws in the reasoning on which the conclusions in the Calcutta case are rested and the anomalies to which they must lead are clearly pointed out in the referring order in A. S. 117 of 1915; and so far as this Presidency is concerned, the opinion of the Full Bench in that case which accepts the view of the referring judges, settles the law for the time being.

Chhita Bhula *v.* Bai Jamni: I. L. R. 40 B. 483.

We are not satisfied that the question raised in this case has received sufficient consideration. The general principle that a mortgagee in possession cannot take advantage of a public sale brought about by his own default is of course well settled; but it seems by no means clear that the mortgagee is, by virtue of S. 76 of the Transfer of Property Act or of any other provision of law, under a legal obligation to repay *takkavi* advances taken by the mortgagor, prior to the date of the mortgage. It is to be regretted that the learned Judges should have thought that the point was one of 'fact' as to which they, as a court of second appeal, had to accept the finding of the lower court. The expression 'charges of a public nature' in S. 76 (c) is no doubt very wide, but it is significant that the obligation enacted is to repay them 'out of the income'. It has also to be noted that the charges referred to are those accruing due *in respect* of the land, *during the possession* of

1. (1913) 15 Bom. L. R. 1021.

the mortgagee. These make it clear that the section has reference to recurring liabilities in the nature of taxes, and cannot be held to cover anything in the nature of a repayment of capital received by the mortgagor. A takkavi advance cannot properly be said to accrue due 'in respect of a particular land,' though the statute makes it *recoverable as if* it were an arrear of land revenue due in respect of the land 'for the benefit of which the loan has been granted. Nor, does it seem to us that the provision for repayment of the loan by instalments, can suffice to make it a charge accruing due 'during' that period. It is neither just nor reasonable that the mortgagee should be obliged to pay 'out of the income' of the mortgaged property, a loan which the mortgagor has taken for his own advantage. It is difficult to see why as between the mortgagor and mortgagee, the *takkavi* advance already obtained by the mortgagor should stand on any higher footing than any other prior mortgage, which a subsequent mortgagee may pay if he chooses, but which he is not *bound* to pay. And it is now settled that a puisne mortgagee is not by that circumstance alone, disabled from purchasing at a sale under a prior mortgage. If there are other facts showing that he took advantage of his position, that would be a different matter. It may be noted in passing that S. 73 of the Transfer of Property Act, in making an exception of sales occasioned by the mortgagee's default, refers only to 'failure to pay arrears of revenue or rent.'

Gangaram *v.* Laxman Ganoba, I. L. R. 40 B. 498.

This case is substantially identical in its facts with *Thiruvenkatachariar* v. *Seshadri Iyengar* [1]. Obviously just as the conclusion arrived at in the two cases may seem, it is difficult to disguise from oneself the anomaly of the position that a transferee from the vendor is worse off than the vendor himself, in relation to a person who is in possession under a mere contract for sale. The decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [2], is being attacked frequently enough, but has not as yet been seriously shaken.

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1. (1916) 30 M. L. J. 559. 2. (1906) I. L. R. 29 M. 336.

Nabibhai Vazirbhai *v.* **Dayabhai Amulakh:** I. L. R. 40 B. 504.

This case deals with a somewhat novel point. The difficulty arises from the fact that it is not either purely a question of Municipal Law or altogether a question of Private International Law as ordinarily understood. The Indian Procedure Code allows the decrees of Courts in certain Native states to be 'executed' in British Courts, as if they were decrees of Municipal Courts. The question for decision in the case arose out of the difference between the laws of limitation prevailing in the two places, in respect of the execution of decrees. Ordinarily, as between two states, the *lex fori* governs in matters of procedure and limitation is comprised under that head; but does this rule apply to the case under consideration? It would be anomalous that while the Code provides that the Native state decree may be executed in British India as if it were a British Indian decree, Courts in British India should hold that by operation of the law of limitation it has ceased to be executable here even though it is in full force in the Native state. And the anomaly would be emphasised, if, as has been sometimes suggested, S. 47, Civil Procedure Code, should be held to bar a *suit* on judgments passed by Courts in such states. The question is not really one of 'jurisdiction' on the part of the executing Court to go behind the order of the Native Court but of the *law* applicable. The decree does not cease to be a foreign decree and the provision in the code only lays down the *manner* of realisation. It seems to us that the decision in this case as also that in *Jeewandas* v. *Ranchoddas* [1], has gone too far in treating the foreign decree as a Municipal decree *for all purposes*; see also *Herkun Chund* v. *Sizanender* [2]. Cf. the decision of a Bench of three Judges of the Madras High Court in *Veeraraghava Iyer* v. *Muga Sait* [3]. It would seem to be more consistent with the policy underlying the rule to hold that in executing such a decree the British Court is to a certain extent acting in aid of the foreign court and that the decree would be executable in British India so long as it is executable in the foreign territory itself. The reasonableness of this view would more clearly appear if we take the converse case, of the limitation law in the Native State prescribing a shorter period

1. (1910) I. L. R. 35 B. 103. 2. (1887) I. L. R. 14 C. 570.
3. (1914) 27 M. L. J. 585

for execution of decrees, than the law in British India. We are unable to believe that it was the intention of the Legislature that the foreign decree should be executable in British India even after its execution had become barred in the Native state.

Gurappa Shivgenappa *v.* **Tayawa Shiddappa; I. L. R. 40 B. 513.**

It is, in a sense, true that elaborate enquiries are not contemplated to be made under S. 7 of the Guardian and Wards Act, but we are unable to see the utility of appointing a guardian in the manner suggested in this case. The only property which the minor was alleged to be entitled to was her deceased husband's share in joint family property, but the opponents alleged that the husband had died undivided, and, with the ordinary presumption of jointness in her way, the minor widow could not claim even a *prima facie* right to that share. The language of S. 7 is of course very general—and advisedly so—but we doubt whether it was intended that a court should trouble itself to appoint a guardian of the 'property' of a minor, on the mere allegation of somebody that the minor is entitled to some property. We may add that it was not necessary for the minor's father to obtain an order of appointment under the Guardian and Wards Act, to enable him to sue on her behalf to assert her right to a share, on the footing that her husband had become divided.

Ram Prakash Das *v.* **Anand Das, I. L. R. 43 C. 707.**

The decision in *Vidyapurna* v. *Vidyanidhi* [1] placed heads of mutts on a peculiar footing and the pronouncement of the Full Bench in *Kailasam* v. *Nataraja* [2] certainly did not help to settle the law. Things were made worse by the decision of the judicial committee, by no means easy to interpret, in *Abhiram Goswami's Case* [3] where dealing with an alienation made by a Mohant, without any justifying necessity, their Lordships decided the question of limitation on the footing that the alienation was good for the life time of the grantor. We hope that the present case at least will bring us nearer to a definite solution. We must not omit to point out that as stated at p. 712 of the report, there

1. (1904) I. L. R. 27 M. 435. 2. (1909) I. L. R. 33 M. 265.
3. (1909) I. L. R. 36 C. 1003.

seems to have been no dispute before their Lordships as to the law on the subject and the general observations of their Lordships only reproduce the views stated in certain Indian decisions, so that it can scarcely be said that there was any investigation of the question by the Board. Curiously enough, *Vidyapurna* v. *Vidyanidhi*, [1] is not even referred to in the judgment. But we venture to think that the decision itself is substantially inconsistent with and must therefore be understood to overrule that in *Vidyapurna* v. *Vidyanidhi*, [1] the latter having proceeded on the footing that the Matadhipati for the time being 'is a real owner and not a mere trustee.' The Privy Council state the legal position in the following terms:—'The nature of the ownership is an ownership in trust for the mutt or institution itself' and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning Mahant, this trust does exist and that it must be respected.' And in another part of the judgment they say 'the mahant is not only a spiritual preceptor but also a trustee in respect of the *asthal* over which he presides.' We may mention that in a recent case *Baluswami Aiyar* v. *Venkataswami Naicken* [2] Sadasiva Aiyar and Burn, JJ. held that *Vidyapurna* v. *Vidyanithi* [1] could no longer be considered good law.

Hemendranath Roy v. Upendra Narain Roy: I. L R. 43 C. 743.

If we may respectfully say so, this case correctly lays down the rule as to the province of Civil Courts in dealing with matters which lie ultimately in the discretion of the executive Government. It is one thing to say that the Court cannot examine the decision of the Executive and a very different thing to say that the Court should not adjudicate on the claims of rival claimants (in so far as there is a question of 'right' to the office) with a view to enable the Executive to act on a proper appreciation of their respective claims. The decision also clearly defines the limits within which a Court may grant to a party a relief not asked for by him in the plaint.

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1. I. L. R. 27 M. 435.

2. (1916) 32 M. L. J. 24.

NOTES OF INDIAN CASES.

Chidambaramma *v.* Hussanamma: I. L. R. 39 M. 565.

There are certain considerations which make it difficult to accept the decision in this case as altogether sound. The judgment proceeds upon the following assumptions; first that when the widow's alienation is not for a purpose binding on the estate the interest acquired by the alienee is only a life interest; secondly that the reversion is in the widow as representing the estate; lastly presumably that that interest is disposable by her. It will be found on examination that none of these assumptions can be accepted without demur. While no doubt it is true that the interest acquired by the alienee is liable to be reduced to a life interest at the option of the reversioner, it is perfectly clear that the alienation is not absolutely void and (i) cannot be derogated from by the widow, (ii) can be ratified by the reversioner. The only persons who can object to the alienation are the reversioners and in the event of an escheat the Crown. *Bijoy Edpal Mukherji* v. *Krishna Mahishi Debi* [1], *Deo Nandan Pershad* v. *Udit Narayana Singh* [2]. We do not think it would be accurate to designate such an interest as a bare life interest. Again, having regard to S. 60 of the C. P. C., which makes power to dispose for one's benefit (understood liberally it may be) condition precedent for attachment, it is difficult to see how the reversionary interest can be attached and sold. With the alienation obviously her power to dispose of it is at an end. All this, of course, is apart from any question of fraud.

Raja of Karvetnagar *v.* Venkata Reddi: I. L. R. 39 M. 570.

One difficulty in accepting the judgment in this case on the preliminary point is that presented by the judgment of their Lordships of the Privy Council in *Shankar Sarup* v. *Mejo Mal* [3] where their Lordships say "the scheme of S. 295 is rather to enable the judge as a matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a *conclusive* adjudication on these rights which may be subsequently readjusted by a suit" taken with *Kotha Hnyin* v. *Ma Hnyin* [4] and *Sivagami* v. *Subrahmaniya Aiyar* [5]

1. (1907) I. L.R 34 C. 329, P. C.
2. (1911) 18 C. W. N. 940.
3. (1901) 23 All. 313 at 322.
4. (1911) I. L. R. 38 C. 717 (P.C.)
5. (1903) I. L. R. 27 M. 259. (F. B.)

which hold that there is no appeal from administrative orders. But it is just possible that their Lordships do not use the word 'administration' in the same sense in the two cases. Another difficulty is, can the order for rateable distribution be said to be made in each of the execution petitions? Is it not the case rather that the order is made in the suit in which the amount is realised, the decree-holders who have applied for execution of their decrees being given a statutory right to come in for rateable distribution? If this is the correct view, then the question such as that which arose in this case would not be one between the parties to the *suit* but one between one of the parties to the suit and a stranger. Questions that arise under S. 73 C. P. C. may belong to any one of the following categories, (i) questions between the judgment-debtor and the decree-holder in the execution of whose decree the assets were realised, (ii) questions between the judgment-debtor and another decree holder, (iii) questions between the decree-holder themselves, (iv) questions that affect the executability of the decree though raised as between the decree-holders. In case no (i) an appeal should lie, subject to what we said above as to the nature of the order, though other persons as well as party to the suit are interested in the question (*Prasanna Kumar Sanyal* v. *Kalidas Sanyal* [1]), and the appeal would lie whether at the instance of the other decree holders or the judgment debtor or the decree holder at whose instance the assets were realised. In a sense the three other classes relate to execution and arise between parties to suits; (cf. *Nadamunt Narayana Aiyangar* v. *Veerabhadra Pillai* [2]) but that does not seem to be the natural meaning of S. 47 and cases coming within Cl. (iii) would not seem to come within S. 47 and such a view would not involve any hardship as S. 73 cl. (2) gives a right of suit. The matter is different in cases coming within cl. (ii) and (iv). In cl. (ii) judgment-debtor is not given a right of suit by S. 73 which is taken away by S. 47 and to avoid the hardship it would seem to be necessary to hold that the order is a joint order on the execution petitions of all the decree-holders in which case, an appeal would lie at the instance of the judgment-debtor. *Venkatrama Sastriar* v. *Mangalathammal*. [3] Though there is no similar hardship in class (iv), still the logic of it would seem to require this case also to come within the appealable category, *Nadamut Narayan Aiyangar* v. *Veera-*

1. (1892) I. L. R. 19 C. 683. P. C. 2. (1910) I.L. R. 34 M. 417.
3. (1906) 17 M.L. J. 90.

bhadra Pillai[1]. The result of this view is that an appeal would be excluded only in the normal type of cases under S. 73 that is to say where the contest is only between the various decree-holders. In other cases, an appeal would lie but a suit would also lie by one decree-holder against another, the final adjudication affording the basis for the suit. We had a similar anomaly under the old code in certain cases coming within S. 244 for instance cases of restitution, questions as to who is a representative, &c.

Maharaja of Bobbili *v.* Narasaraja Bahadur: I. L. R. 36 M. 640 (P. C).

The facts in this case were these. Plaintiff obtained a money decree in the District Court of Vizagapatam. It was transferred to the Munsiff's Court at Parvatipur for execution and some immoveable property was attached but no further steps having been taken by the decree-holder, the application for execution was dismissed. On 9-7-1907, plaintiff applied to the Parvatipur Court for the copy of the decree which had been sent to it for the purpose of execution but he was informed that the same had been sent back to the District Court. He accordingly applied to the District Court on 13th December 1907 for sale of the properties attached and for a notice under S. 248 to show cause why the decree should not be executed. This petition also proved abortive. The next application was on 27-4-10 which was also made to the District Court for the sale of the properties attached by the Parvatipur Court. In his petition, plaintiff alleged that the decree had been sent back by the Parvatipur Court. On inquiry, it was found that this was an error. In the circumstances, the District Court held that the application of 1907 did not save limitation as it was presented to the wrong Court and dismissed the petition as having been barred and also apparently as having been presented to the wrong Court. The High Court in appeal confirmed the judgment of the District Judge. The High Court was of opinion that concurrent execution though permissible, was permissible only in exceptional circumstances and till permission was given so to execute, the application was incompetent and the Court that passed the decree was not a "proper Court" to apply to. In that view, the application for issue of notice under S. 248 though conceded to be a step in aid of execution

1. (1910) I. L. R. 34 M. 417.

was of no avail. The judgment of the Privy Council, so far as one could gather from the brief statement made by their Lordships of the reasons on which the judgment is based proceeded upon a somewhat narrower ground. Their Lordships say that after the transfer till the decree is returned to the extent that the decree could be executed by it, the Parvatipur Court was the only court to which application ought to have been made for execution and as such the application for sale of the properties attached by the Parvatipur Court made to the District Court was incompetent. The application relied upon in this case to save limitation, it might be noticed, was one not for attachment and sale but only for sale that is to say one to give effect to the attachment effected by the Parvatipur Court; whether if an independent application had been made to the Dt. Court for attachment and sale, that might have stood on a different footing their Lordships do not consider, but possibly their Lordships' judgment would have been the same. Their Lordships' judgment is however, no authority for the somewhat curious opinion of the High Court that an application for concurrent execution would not save limitation unless permission is granted for the same. Their Lordships' judgment proceeds upon the logically more satisfactory ground that to the extent the Court to which the decree is transferred could execute the decree, the Court that passed the decree is incompetent to execute the decree and therefore is not a proper Court to apply to. Whether the Court is a "proper" Court does not vary according to the decision of the Court upon the application but depends on the *competency* of the Court to grant the relief.

Their Lordship's judgment cannot also be taken as an authority for the position that the application for the issue of notice under S. 248 is not a step in aid of execution as no argument appears to have been founded before their Lordships upon the circumstance that the application contained a prayer for notice to issue and in itself sufficed to save limitation.

NOTES OF INDIAN CASES.

Narayana Annavi v. Ramalinga Annavi : I. L. R. 39 M. 587.

Though we must confess that none of the reasons assigned by the learned judges for differing from *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], appears to us to be convincing, nevertheless there is an aspect of the case which certainly deserves consideration and which distinguishes the present case from *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], and the case in *Karuturi Gopalan* v. *Karuturi Venkataragavalu* [2], where the conclusion in *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], is accepted. The suggestion that the injunction might not impose a legal obligation is easily dismissed by a reference to the context as well as the language employed. The duty is laid down with reference to partition, and is imposed on the property. It is placed on the same level with the duty to marry sisters. The objection on the ground that the liability is prospective is shared along with maintenance and the other objection that the amount if not required would not revert, could be easily met by making it expressly revertible. The difficulty in assessing the amount required for a future necessity cannot be greater than in assessing damages in the case of anticipatory breaches of contracts. By not assessing the amount at the time of the partition, on the one side, there would be an indefinite liability hovering on the share of the other coparceners, on the other, the right of the person entitled to contribution might be defeated by alienations in the interim. There is no objection to the amount being made payable on the happening of the contingency, and the circumstance of an earlier payment can always be taken account of in fixing the amount. The long standing practice also seems to be in support of the view taken in *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1], (see Strange vol. II, p. 286). But the marriage expenses sought to be provided for in this case were not those of brothers but of brother's sons and this naturally raises the question whether the text could be extended to cover such a case. It has been decided that when the partition is between brothers and brothers' sons the latter are not entitled to be paid the expenses of their marriage. There does not seem to be good reason to differentiate the case where the division is between brothers' sons. So far as one could argue upon analogy it looks as if the liability to marry whether

1. (1912) I. L. R. 38 M. 556. 2. (1915) 29 M. L. J. 710.

males or females is a charge on their father's share; a sister's share is to come out of her brother's share.

There is also a practical difficulty in assessing the amount that ought to be paid. While one branch may consist of 5 members, another might consist of only one member it would certainly be hard if one member should provide for the marriage of five because he has been married at the family expense in addition to his share having been subjected to necessarily larger expenditure for their maintenance &c., during the joint status. The only way in which the case can be made to be covered by the text is by reading the text distributively. This view of the text may be supported by the following arguments. First, it is clear from the language of Vignaneshwara that the sisters also are comprehended within the rule (*cf.* also Vyavahara Mayukha Ss. 38 and 39.) Secondly we have a clue in the interpretation clause (Mitakshara Chap. I, Sec. I, Pl. 5) to the same effect. "Paternal here implies" "says Vijnaneshwara while defining Daya, any relation which is cause of property. By sons, indicates, relationship in general." But the argument is not convincing. Anyhow the restriction imposed by *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* [1] namely that the claim can be made only when coparceners of the same degree are married seems to be necessary.

In so far as this case decides that the status of a joint family is severed only by the decree, it need hardly be pointed out that it is no longer authority in view of the Full Bench decision of this Court in *Soundararajan* v. *Arunachellam* [2] and the decision of the Privy Council in *Musammat Girjabai* v. *Sadashiv Dhundiraj* [3].

Munguluri Sivaramayya v. Bhujanga Rao: I. L. R. 39 M. 593.

With all deference, in the matter of the applicability of S. 5 of of the Limitation Act to appeals under the Provincial Insolvency Act, we prefer the view of Mr. Justice Sadasiva Iyer. We cannot agree that S. 5 affects or alters the period; on the other hand what it does, is to excuse the consequences of the application of "the period", S. 5 does not stand on the same footing as S. 12 which is the subject of the Full Bench in *Abubucker Sahib* v. *The Secretary of State for India* [4]. The Full Bench decision is bad

1. (1915) 29 M.L.J. 710. 2. (1915) I.L.R. 39 M. 159.
3. (1916). 31 M.L.J. 465=L.R. 43 I.A. 151. (P.C.) 4. (1909) I. L. R. 34 M. 505.

enough by itself and taken with the view expressed in this case by Mr. Justice Oldfield, the application of the general provisions of the Limitation Act is *practically* confined to the suits governed by the Schedule to the Act but that is obviously not the intention of the legislature for where it is so to be confined the Act expressly says so (see S. 6 of the Act). The powers claimed by the Court in this case under the Charter Act may appear to be large but there is no harm, so long as they are only held in reserve to be used in exceptional cases.

Mohideen Ibrahim Nachi *v.* Ibrahim Saheb: I. L. R. 39 M. 608.

As we cannot agree that the judgment of the Privy Council in *Annie Besant's Case* [1], could be as easily got rid of as the Bombay High Court are disposed to think, in *Achratal Jekesandas* v. *Chennalal Parbhedas* [2], the interpretation put upon S. 25 in this case is to be preferred to the more narrow construction placed upon the section in the latter case. It is supported, from the analogies drawn from the language used in the Penal Code with reference to kidnapping.

Narayana Singh *v.* Aiyasami Reddi: I. L. R. 39 M. 602.

We are afraid that in the judgment under review there is some misapprehension as to the facts of the case in *Phulkumari* v. *Ghanshyam Misra* [3].

There as here there was a claim (*a*) (i) that the plaintiff's title be declared (ii) that the defendant second party (judgment-debtor) had no right or title left in the said properties, (*b*) that it be further declared that the said properties were not liable to be sold in execution of the decree of the defendant first party against the defendant second party, (*c*) that a permanent injunction may issue on the defendant 1st party and their Lordships say "their Lordships are not satisfied that, even if the value of the action determined the fee, the respondents [that is the defendants] have rightly ascertained the value. What they have done is simply to take the sum in the execution decree. This is plainly a fallacious proceeding. The value of the action must

1. (1916) I. L. R. 38 M. 807. 2. (1916) I. L. R. 40 B. 600.
3. (1907) I. L. R. 35 Cal. 202.

mean value to the plaintiff. But the value of the property might quite well be Rs. 1000 while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of suit." This is exactly what *Krishnan Naidu* v. *Somasundram Chettiar* [1], says but the facts of this case may bring it within the reservation in the Full Bench case.

Narayana Muthad *v.* The Cochin Sarkar: I. L. R. 39 M. 661.

S. 86 of the Civil Procedure Code provides that Sovereign Princes or Chiefs may be sued with the consent of the local Government etc., but not without such consent. The question in this case was whether the privilege conferred by the section may not be waived and whether on the facts of the case, the privilege could be said to have been waived. The rule of international law is that a foreign Sovereign cannot be sued, (*Mighell* v. *Sultan of Johore* [2], *Statham* v. *Statham* [3]), though it is open to such Sovereign Prince when sued to submit to the jurisdiction of the Court. As laid down in *In re Republic of Bolivia Exploration Syndicate Ltd.* [4], the waiver of this privilege can take place only on clear proof of election with full knowledge. The test of submission to jurisdiction in the case of private persons cannot appropriately be made the test of submission in the case of Sovereign persons. In the former case, there is no privilege to be waived, the only question being whether there has been a voluntary submission. In the latter the question is whether there has been an election to waive the privilege and such an election can obviously not be inferred when there is a clear demurrer to the jurisdiction of the Court. Though at one time there was considerable doubt whether when there is a clear demurrer to the jurisdiction, even in the cases of private persons, a submission could be inferred, the later developments of law have construed a pleading on the merits as a submission notwithstanding such demurrer. (See *Rama Iyer* v. *Krishna Pattar* [5],) but in the absence of such a course of authorities in the case of Sovereign Princes, an inference of agreement to submit would for obvious reasons be inadmissible. We cannot however agree that the privilege conferred by the section cannot be waived. The section does not state the consequence of a non-

1. (1907) I. L. R. 30 M. 335.
2. (1894) 1 Q. B. 149.
3. (1912) P. 92.
4. (1914) 1 Ch. 139.
5. (1915) I. L. R. 39 M. 733 (F. B.)

compliance with the rule and the ordinary principles governing objections to personal jurisdiction (see *Sukh Lal Sheikh* v. *Tava Chand Ta* [1]) would seem to justify the application of the doctrine of waiver.

Shaik *v.* **Muhammad: I. L. R. 39 M. 664.**

In a case coming under the Bengal United Provinces and Assam Civil Courts Act, their Lordships of the Privy Council held that a usage is provable though at variance with the Mahomedan Law *Mahomed Ismail Khan* v. *Lala Sheo Mukh Rai* [2] *a fortiori,* evidence would be admissible in cases coming under the Madras Civil Courts Act which is more tender to usages and expressly preserves them in Sec. 16. It is a question of fact in each case whether a particular custom obtains in any community though it must not be forgotten that a description of this particular question as a question of fact is not decisive of the further question whether a second appeal would lie with respect to it *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [3]. Anent the question of usage, courts are disposed more or less in their favour according to the communities in respect of which the question arises and the kinds of usages that are set up. In some cases, like the Tiyans of Malabar the Courts start with no predisposition in favour of any rule whatsoever; in other cases like that of Nambudris they start with certain tendencies but are not positive one way or other. When we come to the lower classes of Hindus again, the Courts are prepared to start with an open mind though if they are not convinced, they go by the general rule of Hindu Law. In the cases of ordinary Brahmins, they are reluctant to accept usage and are prepared to accept it only after. In the case of Mahomedans, the Prophet is more exclusive than the Hindu sages and generally, the disposition is strongly against the acceptance of usages at variance but if they are clearly proved, they are accepted even here. In certain well marked areas like Malabar, the Courts start with certain preferences for certain usages; though less markedly, Mr. Justice Srinivasa Aiyangar is prepared to go with an open mind in the case of Lubbais and other recent converts to Mahomedans. Their Lordships held in this case that a custom among the Lubbais of Coimbatore District excluding females from inheritance was made out.

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1. (1905) I.L. R. 33 C. 68.　　2. 17 C. W. N. 97.
3. (1904) I. L. R. 29 M. 24, 26.

Narayanaswami Naidu *v.* **Subrahmanyam** : I. L. R. 39 M. 683.

If the inam villages in which minor inams exist do not come within the definition of an estate, all the agraharam, shrotriyam and mokhasa villages would be excluded from the definition and this, as Mr. Justice Srinivasa Iyengar rightly observes, cannot have been the intention of the legislature. The definitions of the Act on this point are in the highest degree curious. While the definition of an estate is "any village of which the land revenue alone has been granted in inam to a person not owning the Kudivaram thereof" &c., village is defined as "any local area situated in or constituting an estate designated a village in the Revenue Acts &c." In these circumstances one has to fall back on the meaning of the word as ordinarily understood. A village, ordinarily speaking, is a revenue unit within well defined boundaries and if the entire available revenue thereof is granted to a person not owning the Kudivaram the grantee is the holder of an estate. A receiver would be a land-holder within the definition of that term in S. 3 (5) and there is nothing repugnant in the subject or context to that construction in S. 6, on the other hand, induction of a tenant is but an ordinary act of management and there is no reason why the ordinary legal consequence intended to be attached to such act by the proprietor should not apply to the act of the receiver who acts for him.

Eswara Iyer *v.* **Govindarajulu Naidu**: I. L. R. 39 M. 689.

S. 17 of the Presidency Insolvency Act prohibits the commencement of any suit or legal proceeding except with the leave of the court by any creditor to whom the insolvent is indebted in respect of any debt provable in insolvency. The question in this case was whether an application for arrest of the insolvent in execution of a decree is a legal proceeding within the meaning of the section and their Lordships held that it is, we think rightly.

Rama Iyer *v.* **Krishna Pattar**: I. L. R. 39 M. 733 (F. B).

Of all topics of law, International Law is the one on which uniformity within the British Empire should in the fitness of things be maintained and we think the Full Bench did right in overruling *Parry and Co.* v. *Appasamy Pillay* [1] which was inconsistent with the later English cases.

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1. (1880) I. L. R. 2 M. 407.

NOTES OF INDIAN CASES.

Sayad Amir Saheb *v.* Shekh Masleudin: I. L. R. 40 B. 541.

The position of the Court of Wards in relation to rights of trusteeship vested in a ward is perhaps not very clear, but we do not think there is anything to support the view that a suit for removal of the ward from the management is a suit 'relating to the person or property of the ward.' Where however the suit involves something more than mere removal, especially if it includes a claim to recover moneys from the estate of the ward on the ground of breach of trust, etc., the position becomes different. We venture to think that in deciding 'the nature of the suit' it would be erroneous to exclude from consideration 'the possible consequences' of the suit. The argument of the learned Judges based on the distinction between the expression 'relating to the property of the ward' and 'affecting the property of the ward' is not without weight (cf. the observations of the Madras High Court in *Venkatachalapati* v. *Siva Row Naidu Bahadur* [1]); but the result arrived at by them would have the effect of making the property in the hands of the Court of Wards liable for many a decree which the court may not have had an opportunity of contesting, a state of things that seems to us inconsistent with the policy underlying that legislation. We would also observe, in passing, that the decisions of the Calcutta High Court substantially agree with the Madras view, placing a wide construction upon the words 'relating to the property' of the ward (see *Gobind Sahae* v. *Udit Narain Singh* [2] *Ananda Kumari* v. *Durga Charan* [3].

It is no doubt in a sense true that a decree for damages against a defaulting trustee proceeds on the assumption that to that extent he is in possession of the trust property; but this is not always so (as for instance, in cases of loss arising from negligence &c.) and in any event the legal assumption as to the basis of the liability will not avail when it comes to the question of executing the decree against what is undoubtedly the property of the ward, in the charge of the Court of Wards. It only stands to reason that unless the decree has been so framed as to be binding on the Court of Wards, no properties of the ward can be reached for satisfaction of the decree, *Gobind* v. *Udit Narain* [2]. This brings us to the other point dealt with in the case. We are, with all respect, unable to agree with the view, that even in

1. (1912) I. L. R. 37 M. 388.
2. (1912) 17 C. L. J. 501.
3. (1915) 22 C. L. J. 592.

suits falling within the Act, the representation of the ward by a guardian other than the Court of Wards is a mere 'irregularity.' The point seems to us to be governed not by the principle of the decision in *Walian* v. *Banke Behari* [1], where the question related to the manner of appointment of the guardian *ad litem*—but by that in *Rashidunnissa* v. *Muhamad Ismail* [2], which lays down the true rule of construction in respect of the provisions relating to the persons who are to be appointed guardians.

Pandurang Laxman Uphade v. Govind Dada Uphade: (40 B. 557).

It is much to be regretted that on a question of practice like the one arising in the present case there should be a marked diversity of judicial opinion. Taking the language of the provision in S. 310-A. of the Code of 1882 in its ordinary sense, one should have thought that the right to apply under it could be availed of only by a person who had an interest in the property *at the time of the sale.* The decisions in *Appaya Shetty* v. *Kunhati Beari*[3] and *Manickka Odayan* v. *Rajagopala Pillai*[4] allowing such a right even to a private transferee *after* the sale were an unwarranted extension based upon a misapplication of certain observations in *Erade Manikkoth Krishnan Nair* v. *Puthiedeth Chembakkoseri Krishnan Nair* [5] and 30 B. 577 relating to the case of a transferee before the sale, though after attachment. The legislature intervened in 1908 not merely to make it clear that even persons with *limited* interests in the property could take the benefit of the section but also, as we should think, to overrule the view taken in *Appaya Shetti* v. *Kunhati Beari* [3] and *Manickka Odayan* v. *Rajagopala Pillai* [4] (see *Dulhin Mathura* v. *Bangsidhar* [6].). In *Lakshmi Ammal* v. *Sankaran Nair* [7], however, the Madras High Court greatly narrowed the scope of the amendment, in this respect, by restricting the words " by virtue of a title acquired before such sale " in O. XXI R. 89 to cases where the applicant has only an 'interest' as distinguished from 'ownership' in the property. With all respect, it is difficult to see any logical basis for the distinction between transferees of limited interests and of the full ownership and the decision seems to rest more on considerations of what is assumed

1. (1903) I. L. R. 30 C. 1021.
2. (1909) 19 M. L. J. 631. (P.C.)
3. (1906) I. L.R. 30 M. 214.
4. (1907) I. L. R. 30 M. 507.
5. (1902) I. L. R. 26 M. 865.
6. (1911) 15 C.L. J. 83.
7. (1918) 34 M. L. J. 205.

to be the policy of the rule than upon its language. In the later case of *Subbarayudu* v. *Lakshminarasamma* [1], one of the learned judges approved of this decision while the other reserved his opinion, but both of them concurred in holding that the person who was the owner of the property at the time of the execution sale would lose his right to apply under the section if in the meanwhile he had privately transferred the property.

The Allahabad High Court on the other hand while agreeing with the Madras view that the judgment-debtor cannot after a private sale (subsequent to the Court sale) apply under rule 89, seems also inclined to hold that even the transferee cannot apply *Ishar Das* v. *Asaf Ali Khan* [2]. Now we find the Bombay High Court laying down that the judgment-debtor can take the benefit of the rule in spite of the subsequent alienation and both the learned judges clearly intimate their opinion against the right of the transferee to come in. Here is certainly an interesting illustration of the so called certainty of codified law.

The position is, to say the least, far from clear; and no possible construction of the rule altogether escapes illogicality. It is fairly clear that both under the older rule and *a fortiori* under the present, the legislature proceeded on the basis of the rights existing *at the date of the sale.* It is asked (in *Lakshmi Ammal* v. *Sankaran Nair* [3],) why should the legislature be presumed to have favoured a purchaser after attachment and before the Court sale but not one after the sale. The matter seems to us not to be one of presumption of intention. It is obvious that in the former case the transferee had become the owner of the property at the date of the Court sale (though liable to be defeated by the Court sale) but not in the latter. The assumption that the ownership of the property *at the date of the application* is sufficient to support the application is clearly opposed to the language of the rule, especially in view of the words introduced by the new code. There is more difficulty in dealing with the other side of the question dealt with in *Subbarayudu* v. *Lakshminarasamma* [1] and *Ishar Das* v. *Asaf Ali Khan* [2], *viz.*, that the existence of an interest in the property at the date of the application is *necessary* to support such an application. It seems to us erroneous to regard the right to apply under rule 89 as a kind of legal incident naturally connected with a right of property and

1. (1918) I. L. R. 38 M. 775. 2. (1911) I. L. R. 34 A. 186.
3. (1918) 24 M. L. J. 205.

thence conclude that such right of property must exist at the date of the application. We fail to see how after the Court sale the judgment-debtor or any other person whose interests in the property are bound by the sale can in any real sense be regarded as continuing to retain his rights in the property. Under the present Code, at any rate, the necessity for confirmation before the sale can become absolute does not logically bear on the question of the passing of the property any more than the necessity for registration of the sale deed in the case of a private sale. Before the rule in S. 310 A was enacted, there existed the other provisions of the code relating to the confirmation of the sale as well as the setting aside of the sale. (on the ground of material irregularity etc.) The right to set aside was strictly limited to certain defined causes and except in such cases, confirmation had to follow as a matter of course. It will be arguing in a circle to say that the introduction of the wider right, to apply under S. 310 A, recognised a continuing ownership in the judgment-debtor and thence say that the right to apply under that section is an incident of such ownership. Some confusion on the question of the passing of the property from the judgment-debtor no doubt existed till recently because of the provision in the Code of 1882 that as between the parties to the suit the title shall vest in the purchaser 'from the date of the certificate and not before.' But all arguments based on this provision have been got rid of by the change in the new code (S. 65) which vests the property in the purchaser as from the date of the sale. The proper view seems to us to regard the right of application under Rules 89 and 90 of O. XXI as statutory privileges allowed to certain persons, no doubt on the ground of their interest in the property sold but not necessarily as incidental to a proprietary interest treated as inhering in them at the date of the application. The decisions in *Subbarayudu* v. *Lakshminarasamma* [1] and *Ishar Das* v. *Asaf Ali Khan*[2] lay stress not merely on some such inherent connection between the proprietary interest and the right to apply, but on the words 'owning' (such property) 'or holding' (an interest) in the rule, which seem clearly to imply the *continuance* of the proprietary connection down to the date of the application. The force of the latter argument cannot be denied, nor is it sufficiently met by the observation in the Bombay case that the rule does not in terms say that the right or interest should exist

1. (1918) I. L. R. 38 M. 775. 2. (1911) I. L. R. 34 A. 186.

'at the date of the application.' We fail to see the logic of the position there taken by the learned Judges that in spite of the court sale, it is possible to regard the Judgment-debtor as in some sense 'the owner of the property in the eye of the law,' so long as the sale remains unconfirmed, and yet negative the incident of 'transferability' to this ownership. It is one thing to say that such a transferee is not within the terms of rule 89, but a different thing to say, as the learned judges do, that till the sale is set aside, the original owner—though still continuing to be 'owner' in some sense—has no title to transfer. It is certainly not consistent either with the form or with the substance of the transaction to suggest that in such cases the transaction between the debtor and his transferee must be regarded as amounting only to an 'agreement to transfer'. It is of course open to the parties to enter into a mere 'agreement' so as to avoid all difficulties under rule 89, but where for whatever reason they do not choose to do so, it is not for the court to say that the transaction cannot amount to anything more than an agreement to sell.

Arjun Ramji *v.* Ramabai : I. L. R. 40 B. 564.

The question raised in this case is practically one of first impression. A person to whom a cause of action to sue for possession accrued during his minority died nearly 9 months *after* attaining majority. The ordinary period of 12 years expired a few months after the death of that person and after such expiry, his legal representative brought the suit. The question was whether that suit was in time. The learned Judges answer it in the affirmative. We must confess we feel grave doubts as to the soundness of this decision. If the *quondam* minor had continued to live he would of course have had three years from the date of his majority within which to sue; if again, he had died while yet a minor—even if it be just a few days before attaining majority—his legal representative would have had at least three years from the date of such death. But once he attained majority, it seems to us that when he dies, the privilege of suing (in spite of the expiry of the ordinary period of limitation) would die with him too. It is clear that a supervening disability, if it sets in *after* the attainment of majority, will not avail to extend the time. Again if the cause of action had accrued during the predecessor's lifetime the minority of the successor in title would be of no avail,

however short might have been the interval of time between the accrual of the cause of action and the death of the person to whom it had accrued. It may no doubt be said that these cases are not analogous and that the hardship in such cases is not very great, because the next friend at least could sue, during the disability. But it appears to us that there is no warrant for the general assumption that as long as the right to the property in the hands of the quondam minor is not extinguished by lapse of the extended term prescribed, the right to sue for it is a kind of *substantive* right independent of the personality of the minor.

Anomalous, as it may seem, there is much to be said for the view that the privilege of suing within the extended period is 'personal' to the minor in the sense that it cannot be availed of by a transferee from him. [The personal character of the similar privilege conferred upon Government is now established beyond question (see *Jagadindranath* v. *Hemanta Kumari* [1].)]

Why should the 'legal representative' stand on a better footing. We are unable to see how the definition of 'plaintiff' in S. 3 helps us to construe S. 6. And though the third clause of S. 6 may not suffice to *exclude* the present case from the section and may be explained as necessary for other reasons—such as the fixing of a different starting point or as providing for a case not covered by the first clause—there is nothing in the language of the first clause of the section to cover the present case. The decision in *Mahadev* v. *Babi* [2] throws no light whatever on the present question. It only draws attention to the distinction suggested by the third clause of the section between the case of a 'legal representative' and that of a 'transferee.' As for the argument based on S. 89 of the Probate and Administration Act or the general principle of continuity of personality between a person and his 'legal representative', it is begging the question to assume that the privilege of suing within the extended time survives the minor. The policy of the Limitation Act would seem to be that once a person is in a position to sue (by himself) he postpones his suit *at his peril.*

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1. (1904) I. L.R. 32 C. 129 (P.C.). 2. (1902) I.L. R. 26 B. 703.

NOTES OF INDIAN CASES.

Laljee Mahomed *v.* Guzdar: I. L. R. 43 C. 833.

In view of the frequency with which the matter has latterly come up for consideration and of the numerous and diverse, not to say conflicting, dicta on the point, we would invite special attention to the full discussion in the Judgment of Mr. Justice Mookerjee, in this case, of the question of the propriety of an Appellate Court interfering with findings of fact of the Court of first instance when such findings are based on conflicting oral testimony.

Mathura Sundari *v.* Haran Chandra: I. L. R. 43 C. 857.

The relation of S. 15 of the Letters Patent of the High Courts to the several provisions in the Indian Procedure Code as to appeals from orders &c. is far from definitely settled yet. Though the Indian Legislature has power to affect the provisions of the Letters Patent, there is nothing in the Code at present to restrict the operation of clause 15 of the Letters Patent. But the question whether the right of appeal under that clause has been *added to* by the provisions of the Code has given rise to some diversity of opinion.

Chutterput Singh *v.* Sait Sumari Mull: I. L. R. 43 C. 903.

The delegation of quasi judicial functions to the Registrar seems to give rise now and then in Calcutta, to important questions as to the true limits of his jurisdiction. Sometime ago a Full Bench had to consider the effect of his granting leave to sue under the Letters Patent. *Laliteshwar Singh* v. *Rameshwar Singh* [1]. In the present case, the decision turned on the effect of an order by the Registrar for transmission of a decree to another Court for execution, which, it was claimed amounted to an *implied* decision by him that the decree was executable. It may at this stage be pointed out that in *Saja Hossein* v. *Monohur Das* [2], and *Emrao Singh* v. *Lakshmi Narain* [3], the order for transmission had been made by the Judge himself. But even apart from this difference we respectfully think that the conclusion arrived at by the Full Bench in the present case is the more reasonable one. The application of the rule of finality to orders in execution proceedings, especially in the case of orders passed *ex parte*, must be strictly limited by reference to the substance of the petition on

1. (1907) I. L. R. 34 C. 619. (F. B.) 2. (1896) I. L. R. 24 C. 244.
3. (1904) I. L. R. 26 A. 361.

which the order in question has been passed and it will be dangerous to extend its effect by any principle of implied or constructive adjudication. A person on whom a notice is served to show cause against a particular petition—in this case, an application for transmission of a decree to another Court—may not appear to contest it, in the belief that the award of the relief claimed in that petition will not affect him, but that ought not to be held to preclude him from contesting subsequent petitions for other reliefs which do not necessarily arise out of the former petition.

As to the other point mooted in the case, *viz*, the functions of a Court that is asked to transmit its decree for execution to another Court, it is by no means clear whether in dealing with such an application the court is confined to a consideration of the matters specified in the sub-clauses of S. 39. If the correct view be that an application under S. 39 relates to a stage prior to and different from that of execution properly so called, it would seem to follow that the court is not at that stage called upon to enter into questions that will arise only when the application for execution is made. If, on the other hand, the words 'send it for execution' in the section, can be held to imply that the court is to decide the question of the 'executability' of the decree before sending it 'for execution' to another court, the court can—and properly must—decide questions relating to that point even in dealing with applications under that section. But it is certainly undesirable that it should be a matter of *option* with the court to deal or refrain from dealing with such other questions at that stage. On the answer to this question will depend the further question, whether or not a notice under O. 21, R. 22 (old S. 248) is necessary in the case of an application under S. 39; but we do not think it right that a court should take action under S. 39 without any notice to the judgment-debtor.

Uzir Ali Sardar *v.* Savai Behara: I. L. R. 43 C. 938.

It is to be regretted that the new code did not attempt to settle the conflict of rulings as to the power of an Appellate Court to remand a case in circumstances not falling within S. 562 of the Code of 1882 (now O. 41 R. 23.) The decision in *Habib Baksh* v. *Baldeo Prasad* [1], and the cases following it clearly showed the necessity for the recognition of such power in certain cases, but it has been stated that the special committee that settled

1. (1901) I. L. R. 23 A. 167.

the present code were not inclined to embody that view in the code. S. 564—which in terms forbade a remand in cases not covered by S. 562—has however not been re-enacted; and this omission has in turn led to some difference of opinion as to its effect. The result is that there are several cases holding that the power of remand is wider under the new code than before. See for instance *Muthusami Odayan* v. *Kolandavelu Odayan* [1], while other decisions maintain the contrary (cf. *Nabin Chandra* v. *Pran Krishna*) [2]. An intermediate view has been suggested in *Narottan* v. *Mohun Lal* [3]. It must however be observed that the mere omission of S. 564 will not suffice to give the power and that has therefore to be found somewhere else. As to this, the decisions are not altogether clear, whether it is to be found in the general language of S. 107 or in S. 151 which gives statutory sanction to the doctrine of inherent power. One direct consequence of the omission of S. 564 is to give scope for the argument that an unauthorised remand is at any rate only an irregularity falling within the operation of S. 99 of the Code and not an illegality (as held under the old Code, see *Palani Chetti* v. *Rangiadoss Naidu* [4].)

Gangadhar Bogla *v.* Hiralal Bogla: I. L. R. 43 C. 944.

It cannot be denied that some at any rate of the Hindu Law texts are unfavourable to the view that an adopted son stands for all purposes on the same footing as an *aurasa* son. We also venture to think that there is something to be said for the view that the rule as to inequality of shares, laid down in the text of Vasishta, in case of a partition between an adopted son and an after born *aurasa* son of the *same* father, implies a similar inequality in all cases of competition between them, other conditions being equal; and this is supported by the analogy of the rule applicable to cases of competition between kindred of the full blood and of the half blood. But the decisions of the highest tribunal, including the latest, in *Nagindas* v. *Bachoo* [5], have made it impossible for courts in this country to give effect to this view.

The other point raised in the case, related to the claim of a 'stepson' to come in within the rule allowing a 'son' to succeed to his mother's Stridhana. So far as this was overruled on the strength of the word अनपत्यायां in Mitakshara II xi 19, we would

1. (1914) M. W. N. 90.
2. (1913) I L. R. 41 C. 108.
3. (1912) I. L. R. 37 B. 289.
4. (1908) I. L. R. 32 M. 88.
5. (1915) I. L. R. 40 B. 270. (P. C.)

observe that the very point left open by Mookerjee, J. (at p. 967) *i.e.*, whether that word would cover the case of a son *adopted* by or in conjunction with the woman herself, shows the danger of laying undue stress on the literal meaning of that term as referring to 'issue *born* of her.' We are however unable to say that the learned judges erred in rejecting the argument based on the text of Manu (Ch. 9 Sl. 183) that by the birth of a son to a co-wife, the other wives also become 'mothers of male-children through that son.' For, as observed by the Privy Council in *Annapurni* v. *Forbes*, [1] such texts, if applied to the law of inheritance in the way contended for, 'would prove too much; they would be equally good to prove that a natural mother and her co-wife stand on an equal footing, which is clearly not the case'.

Jatindra Nath Basu *v.* **Peyer Deye Debi** : I. L. R. 43 C. 990. (P. C.)

The Judgment in this case is, we regret to say, far from informing. The suit was brought for specific performance of a contract for the purchase of a decree for sale of mortgaged properties. The execution of the decree had been allowed to become barred between the date of the contract, and the institution of the suit and that was relied on as a defence to the claim for specific performance. It cannot of course be disputed that in the absence of an assignment in writing the purchaser could not have taken steps to execute the decree or keep it alive. But there is some difficulty in following their Lordships' conclusion that the necessary result of the decree becoming barred was to render the contract unenforceable. It will be noticed that there is no investigation by their Lordships of any question as to the party by whose default the execution of a formal assignment was delayed. The judgment of the High Court was based on the finding that the real consideration for the contract was something more than the mere benefit under the decree, that the purchaser had had the full benefit of that real consideration, and that as for the non-execution of a formal assignment of the decree it was not due to any default on the part of the vendors but to the evasive and obstructive tactics of the vendee. None of these considerations is adverted to in the judgment of the Privy Council; and if that be because their lordships thought them immaterial it is difficult to understand the reason for it.

1. (1899) I. L. R. 23 M. 1.

The bar of limitation in respect of the executability of the decree cannot make the case for specific performance worse than the destruction of the subject matter of the contract; and as to this, the rule in England is "clearly settled that the destruction or failure of the subject matter of a contract after it is entered into does not relieve a purchaser from the obligation to perform it" (*See Coles* v. *Bristowe*[1]. See also Fry on Specific Performance S. 1528 and S. 914 et seq.). We are not unmindful of their Lordships' frequent warning to courts in India against the danger of importing the doctrines of English equity but the rule above referred to is substantially enacted for India by S. 13 of the Specific Relief Act. There may be a question as to whether illustration (a) to that section does not go beyond the terms of the section itself. But it is unnecessary to pursue that matter here in view of the fact that their Lordships' judgment does not deal with the argument urged by counsel on foot of Ss. 13 and 14 of the Specific Relief Act.

It may be said that the present case is distinguishable from that contemplated by S. 13 on the ground that the vendors could have kept the decree alive if they so chose and that it was by their default or negligence that the decree became barred. But it is difficult to see how that will affect the present question unless there is any principle of law imposing such an obligation on the vendors. This in a way raises the question whether the purchaser did not become the owner of the decree until the execution of the formal assignment. For, if he had already become the owner in equity the loss must be borne by him; whatever other remedies he may have for damages against the vendors on the ground of their negligence. The High Court found—and this finding is not questioned by their Lordships—that long before the decree became barred the vendors gave notice to the purchaser of their readiness to execute an assignment and that they even gave him notice that the decree would soon become barred. The assignment was to be made only on the vendee paying the stipulated price but he would not pay it and began to raise all kinds of objections, evidently because he had already gained the ulterior purpose for which he had entered into the contract. It is no doubt true as pointed out by their Lordships that the agreement was 'executory' but that does not mean that there was no complete contract; and the purcha-

1. (1868) L. R. 6 Eq. at p. 159.

ser cannot take advantage of his own default to throw upon the vendor the obligation to take further care of the subject matter of the contract beyond the time fixed for completion. The ordinary rule (in England) is that the vendor is not answerable for what may happen to the property after the time when the purchaser *ought* to have taken possession. (See *Minchin* v. *Nance* [1]. Fry S. 1437).

Their Lordships observe that a transfer of the decree could, by reason of S. 232 of the Civil Procedure Code of 1882, be effected only by an assignment in writing and it looks—though they do not say so—as if they acted on the analogy of the provisions in Ss. 54 and 55 of the Transfer of Property Act by which the theory of equitable ownership is excluded and it is left to the vendor to preserve the property till it is delivered and bear the loss arising from its destruction before the title is formally transferred. If this be the basis of the judgment, we beg leave to doubt if S. 232 Civil Procedure Code (now O. XXI R. 16) is really analagous to S. 54 of the Transfer of Property Act. It does not provide that the title to the decree cannot be transferred except by an assignment in writing but only requires such a document as a condition precedent to the transferee executing the decree. That this is a mere rule for purposes of execution proceedings is shown by the fact that even an assignment in writing does not *as of right* entitle the assignee to execute the decree and instances are not uncommon in which the executing court refuses to allow such an assignee to come in and refers him to a regular suit to establish his rights. There is no rule of law which excludes decrees from the operation of the rule of transferability without writing under S. 9 of the Transfer of Property Act, for, a decree (even though it may direct a sale of immoveable property) is not itself immoveable property within the meaning of S. 54 (*Cf. Gous Mahomed* v. *Gawas Ali Khan* [2], under the Registration Act), nor is it 'actionable claim' within the meaning of S. 130. (See *Afzal* v. *Ram Kumar Bhudra* [3] and *Dagdu* v. *Vanji* [4]).

Bapu v. Bapu : I. L. R. 39 M. 750. (F. B.)

It is no doubt somewhat curious that the same matter if it should be dealt with by the High Court as a revision under S. 439 (for the power of the High Court to deal with sanction proceedings

1. (1841) 4 Beav. 332.
2. (1896) I. L. R. 23 C. 480.
3. (1886) I. L. R. 12 C. 610.
4. (1900) I. L. R. 24 B. 502.

under that section if it so chooses is not excluded by the decision of the F. B.) the opinion of the third Judge should be taken while if it came as on appeal under S. 195, the judgment of the Senior Judge is to prevail but such inconsistencies are not lacking in the history of Indian Legislature which is due to the non-adoption of a uniform rule as regards the disposal of appeals when Judges are equally divided. There are 4 different rules adopted in India in this matter.

(i) That enacted by the Civil Procedure Code, S. 98 *viz.*, that the confirming judgment should prevail. This is the practice of the House of Lords (*Paquin Ltd.* v. *Beauclerk* [1]) and seems to be the general rule in the absence of special statutory rules to the contrary. (See 9 P. D. 96).

(ii) That enacted in Art. 36 of the Letters Patent *viz.*, that the opinion of the Senior Judge shall prevail.

(iii) Reference to a third Judge as under S. 98, Civil Procedure Code in which case the opinion of the majority is to prevail (reargument before 3 Judges is the rule adopted with respect to the Court of appeal in England).

(iv) Reference to a third Judge as under S. 429, Criminal Procedure Code, whose opinion is to prevail irrespective of the question whether his opinion is supported by any of his colleagues or not.

So far as the Chartered High Courts are concerned Art. 36 of the Letters Patent prescribes the general rule and must govern all cases unprovided for by special enactments. The Full Bench hold that sanction appeals are one of such cases. The Full Bench also confirm the opinion of the prior Full Bench in *Muthusami Mudali* v. *Veenichetty* [2] that confirming a sanction is equivalent to granting one. A necessary implication of the judgment of the Full Bench would seem to be the correctness of the rule laid down by the referring Bench that Art. 154 does not apply to sanction appeals.

Bapu *v.* Bapu : I. L. R. 39 M. 768. (F. B.)

The judgment of the Full Bench proceeds on the view that legal evidence is necessary before an order for sanction can be made. This is in conformity with the opinion of the Full Bench in *Queen Empress* v. *Sheik Beary* [3]. This legal evidence that

1. (1906) A. C. 148.
2. (1907) I. L. R. 30 M. 382.
3. (1886) I. L. R. 10 M. 232.

is required is not for conviction but for granting sanction for prosecution. Much of the confusion is due to forgetting this essential fact. The grant of sanction being a judicial act, and subject to appeal, the Court can act only on evidence which is legal and which can be examined by the Appellate Court, but the evidence that may induce the granting of sanction is not necessarily evidence relevant in the trial of the case. However, since reasonable probability of conviction is one of the essentials for the granting of sanction reasonable certainty of the existence of the materials for such conviction is also essential and as the court can have cognisance of such materials ordinarily only by having them before it, it follows that, ordinarily speaking, there must be legal evidence for conviction before sanction can be given. But probability of such materials is not on element which can be ignored.

Re Abibulla Ravuthan: I. L. R. 39 M. 770.

That gaps in prosecution evidence cannot be filled up by the examination of the accused has been repeatedly laid down, nevertheless the practice does not die out. The fault lies in the system and not in the individual Magistrate or Judge. The judicial and the executive functions are so mixed up in this country that an attitude of mind is gradually developed with which it becomes very difficult to view the situation from the proper judicial standpoint.

Raja Venkatappa Nayanim Bahadur *v.* Renga Rao: I. L. R. 39 M. 772.

We think that Courts have already proceeded too far in recognising the senior widow's right to adopt so as to divest the junior widow's estate without her consent and it is decidedly against the policy of the law as developed in the decisions to recognise the junior widow's right also to similarly divest the senior widow's estate. Even in the case of the senior widow, it is a question worth consideration whether the right should be recognised when the widows are divided; it should not be impossible to hold at least that in those circumstances the junior widow should be consulted.

NOTES OF INDIAN CASES.

Achratlal Jekisandas *v.* Chimanlal Parbhudas: I. L. R 40 B. 600.

While it may be admitted that the decision of the Privy Council in *Annie Besant* v. *Narayaniah* [1], does not *decide* that the Guardian and Wards Act excludes a regular suit in respect of matters provided for therein, there can be little doubt that the reasoning in that judgment is inconsistent with the view that such matters can be litigated by way of an ordinary suit *inter partes*. If, as their Lordships hold, the question of a father's right to revoke an arrangement made by him for the guardianship of his minor children and resume custody of them "could only be decided by a court exercising the jurisdiction of the Crown over infants and in their presence" because it is a matter 'to be determined, having regard to the interests and welfare of the infant', the same consideration would equally govern any other question relating to guardianship of infants; and it cannot be said that every court in which an ordinary suit may be instituted (subject to the rules of the processual law), such as a Munsif's Court, can claim to exercise the jurisdiction of the Crown over infants. The decision in *Sharifa* v. *Munekhan* [2], can scarcely be looked upon as authoritative. The learned judges merely follow a precedent in their own court; Chandavarkar, J. is evidently not without doubts as to the correctness of the view and Jenkins, C. J. refrains from referring the question to a Full Bench only in the hope that 'at no distant date' the legislature would 'explicitly' substitute the procedure under the Act for an ordinary suit.

When however we come to S. 25 of the Act, other difficulties arise. The literal construction of the section would seem to justify the view taken in the case under notice that it cannot apply to a case in which the ward has not at one time been in the custody of the guardian and then 'leaves' or 'is removed from' such custody. It may with reason be urged that so far at any rate as cases not provided for in the Act are concerned, the Act cannot be held to exclude the remedy by way of suit; but the Allahabad High Court in *Utma Kuar* v. *Bhagwanta Kuar* [3], preferred to strain the language of S. 25 so as to make it cover a case of the kind above referred to.

1. (1914) I.L. R. 38 M. 807. 2. (1900) I. L. R. 25 B. 574.
3. (1915) I. L. R. 37 A. 515.

The *ratio decidendi* of that decision will however apply only to those cases in which a guardian has been appointed *by the Court*, for the learned Judges lay stress on the minor having 'become a ward of the Court in consequence of such appointment'. Part of the reasoning in this judgment did not commend itself to the learned Judges of the Madras High Court who decided *Ibrahim Nachi* v. *Ibrahim Sahib* [1], but in the result they were prepared to strain the language of the section even further, there being not even an appointment by the Court in the Madras case. The reasoning of their Lordships that it could not have been the intention of the Legislature to drive the guardian to a regular suit in such cases is entitled to respectful consideration, but it would certainly be better if, fulfilling the hope expressed by Sir Lawrence Jenkins more than 15 years ago, the Legislature would intervene to put some of these questions beyond doubt.

Madhavrao *v.* Anusuyabai : I. L. R. 40 B. 606.

The Indian law, partly on account of the peculiarities of its customary tenures and partly as a result of its attempt to avoid the theory of successive life estates, has carried very far indeed the separation between the formal conception of a 'continuity of estate' between successive holders and the actual extent of the powers of each holder. It has now become well established that the circumstance that the holder for the time being cannot alienate or incur liabilities so as to bind his successor or even that the successor cannot claim to inherit as of right but only come in with the approval or by order of government or some such controlling authority does not prevent the application to such cases of the rule of 'representation' or 'continuity of estate' as between different holders, for purposes of the rules of *res judicata* and limitation. And as a result of this view, it is equally well settled, anomalous as it may seem, that though a person could not alienate a property so as to bind his successor, the successor may be bound by the consequence of the *laches* of his predecessor, on account of the operation of the statute of limitation. The present case is but an application of these rules to Saranjam estates.

1. (1915) I. L. R. 39 M. 608.

Bai Diwali *v.* **Umedbhai Bhulabhai:** I. L. R. 40 B. 614.

We are unable to follow the decision on the question of limitation in this case. A registered usufructuary mortgage provided that after possession by the mortgagee for 11 years, the mortgage amount should be paid to him whenever he should demand it, either out of the property or by the mortgagor or his heirs personally. The mortgagee did take possession, but as a matter of *law* the mortgage was bad as opposed to the provisions of the Bombay Bhagdari Act. After the expiry of the 11 years and before the lapse of 6 years from that date, a person standing in the shoes of the mortgagee sued to recover the money. The learned Judges hold that 'the consideration or part of the consideration being unlawful, the mortgage deed was void and the agreement contained in the mortgage to pay the mortgage debt was void.' The result, according to them, was that the mortgagee was only entitled to a claim for money had and received (under Art. 62), as on a failure of consideration *ab initio.* The learned judges seem to us to have misapplied S. 24 of the Contract Act; we are unable to agree that the covenant to repay was void and that the case was really one of failure of consideration.

It is a well established rule that 'a lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time for the same consideration," Pollock's Principles of Contract, 8 Edn., p. 384 ; *Bank of Australasia* v. *Breillat* [1]. The Bhagdari Act merely declares that an alienation of an unrecognised subdivision of a *bhag* shall be void. It does not prevent the owner of such an interest from entering into personal covenants, nor does it make such alienation 'illegal' (as distinguished from 'void') so as to taint even collateral agreements. We do not see why the unenforceability of the mortgage as such should make the covenant to pay also void. Take the familiar instance of a mortgage turning out invalid for want of registration or attestation as required by law; it has nearly always been held that in spite of the failure of the stipulated arrangement to that extent, the personal covenant to pay does not cease to be operative or enforceable. How does the present case stand on a worse footing ? In this connection there is this distinction to be borne in mind between a sale and a mortgage. In a mortgage the debt is the primary thing and the security is

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1. (1847) 6 Moo, P.C. 152.

only accessory thereto, so that it is impossible to regard the failure of the security as affecting the existence or enforceability of the debt and no question of failure of consideration properly so called arises; but in the case of a sale, if the transfer proves inoperative there is nothing else left of the contract and hence the purchaser, if he had paid the sale price, is entitled to recover as on a failure of consideration. We may point out in passing, that even if there was a case of failure of consideration in the decision under notice, it was not a failure '*ab initio*'; for the mortgagee appears to have got into possession in pursuance of the mortgage and so long as it lasted—whether the mortgage itself was lawful or not—there cannot be said to be a failure of consideration. See for instance, *Narsing* v. *Pachu* [1], *Rajagopalan* v. *Somasundaram* [2].

As for the decision in *Javerbhai* v. *Gordhan Narsi* [3], it seems to us to tell against the view taken in the present case. It no doubt lays down that the mortgage *qua* mortgage is bad and the claim for possession on foot of it cannot be enforced but far from holding that other covenants in the document are void, the learned judges there give relief on the basis of an express covenant in the deed for compensation in the event of hindrance to or deprivation of possession. And it is worthy of note in this connection that in reversing the decision of the lower court on the question of limitation, they clearly make the distinction between the claim on the covenant and a mere claim on the footing of failure of consideration. We have for other reasons doubted the correctness of the decision in that case (see 29 M. L. J. Notes of Ind. Cases, p. 44) but the reasons there given for holding that there is nothing in the Bhagdari Act to make the personal covenant in the mortgage deed unenforceable seem to us convincing.

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1. (1913) I. L. R. 37 B. 538. 2. (1906) I. L. R. 30 M. 316.
3. (1914) I. L. R. 39 B. 358.

NOTES OF INDIAN CASES.

Krishna Chettiar *v.* Nagamani Ammal: I. L. R. 39 M. 915.

We wish the judgment were more clear as to the exact basis on which the minor's estate was in this case made liable. If it is on the basis of the note, then we must confess that there are great difficulties in accepting the judgment as sound. A whole series of cases beginning with *Waghela Rasanji* v. *Sheikh Masludin* [1], see *Indur Chunder Singh* v. *Radhakhishone Ghose* [2], *Soundaram Ayyar* v. *Sennai Nicken* [3], *Surendra Nath Sarkar* v. *Atul Chandra Roy* [4], *Bhawalsahu* v. *Raijnath Pertab Narain Singh* [5], *Duraisamia Reddi* v. *Muthial Reddi* [6], *Sanker Krishna Murthi* v. *The Bank of Burma* [7], *Mirsarrworan* v. *Fakrudin Mahomad Chowdri* [8], (even *Subramani Ayar* v. *Arumuga Chetty* [9], seems to assume that the general rule is that) lay down that a guardian cannot impose a personal liability on the minor and if the note is to be treated as an undertaking merely to pay out of the minor's estate, that would strike at the *note* detracting from the "unconditional nature of the undertaking." A guardian can only deal with the estate. As pointed out in *Indur Chunder Singh* v. *Radhakrishna Ghose* [2], *Hanuman Prasad Panday* v. *Mussamat Baboru Murraj Koonwarji* [10], was the case of a mortgage by a guardian.

The alternative course which is referred to in *Bhawal Sahu* v. *Baijinath Pertab Narain Singh* [5], of allowing the creditor to be subrogated to the right of indemnity possessed by the guardian which is not noticed by the learned Judges steers clear of the difficulties presented by the above cases but it is a question whether the Indian procedure permits of such a course. In *Sanker Krishnamurthi* v. *The Bank of Burma*, [7] Wallis and Munro, JJ., were not prepared to go as far, limiting the rights of the trade creditors to a right of recourse only to the assets embarked in the trade. That course has its justification in the analogies drawn from executor's cases. Persons who have advanced money to the executor are not entitled to proceed against the estate (see *Debendra* v. *Hemachendra* [11].)

1. (1887) I. L. R. 11 B. 551. (P. C.)
2. (1892) I. L. R. 19 C. 507.
3. (1900) I. L. R. 23 M. 547.
4. (1907) I. L. R. 34 C. 892.
5. (1907) I. L. R. 35 C. 320.
6. (1908) I. L. R. 31 M. 458.
7. (1911) I. L. R. 35 M. 692.
8. (1911) I. L. R. 39 C. 232 (P. C.)
9. (1902) I. L. R. 26 M. 330.
10. (1856) 6 M. I. A. 393.
11. (1908) I. L. R. 31 C. 253.

No doubt there are certain authorities that hold that a widow's or manager's bond can be enforced against the estate applying the principles of Hanuman Prasad Pandey. There are also certain but more doubtful cases which apply the same rule to a trustee's bond. That there is no justification for such an extension in English precedents is perfectly clear. It will be found on examination of the manager's cases that they are all based on the doctrine of subrogation to the right of indemnity but it is certainly more than doubtful if the law can be said to be sufficiently logical to admit of the extension of the rule to guardian's cases. The case of *Subramania Iyer* v. *Arumuga Chetty* [1] which their Lordships purport to follow seems to base the minor's liability not on the note as such but on it as an acknowledgment of a pre-existing liability.

Jagapathy Raju *v.* Sadrusannama Arad: I.L.R. 39 M. 795.

This case lays down certain principles applicable to suits under Ss. 69 and 70 of the Contract Act which are very essential but which are so often forgotten ;

(i) That S. 69 can apply only where the deft. is personally liable to make the payment.

(ii) That neither S. 69 nor S. 70 can justify the imposing of a higher obligation on the deft. than he was originally under; for instance it could not impose on a person a personal liability for the discharge of an obligation which could be enforced only against specific property.

(iii) That neither of these sections can apply where the plaintiff himself is under an obligation to make the payment.

There is much in reason to support the conclusion of the learned judges that the section cannot apply to cases of contribution. This view may lead to considerable hardship in Bengal where a different view prevails from that taken in *Raja of Vizianagaram* v. *Raja Setrucherla* [2].

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1. (1902) I. L. R. 26 M. 330. 2. (1903) I. L. R. 26 M. 686.

NOTES OF INDIAN CASES.

Secretary of State for India v. Rangasawmy Iyengar : I. L. R. 39 M. 831 (F. B.)

So far back as 1847, in a case governed by the Mitakshara Law, the Privy Council decided that the interest of a member of an undivided Hindu family is liable to confiscation for absconding *Musst. Gulab Kunwar* v. *The Collector of Benares* [1] and seeing that Courts have even in other directions travelled very far from the position that that interest is not property (assuming that that position was at any time true), the only possible conclusion was the one arrived at in this case. But it does not appear that *Juggomohun Bukshee* v. *Roy Mothoornath Chowdry* [2] was a Mitakshara case; on the other hand, judging from the names of the parties and the district from which the case came, we should think the parties were governed by the Dayabhaga Law. As rightly pointed out by the Full Bench, the position that the interest of the undivided member is attachable does not involve, any more than the fact that it is attachable in execution of decrees, the recognition of any right to interfere with the rights of the other members. Just as attachment in execution severs the interest of the judgment debtor, *Madho Pershad* v. *Mehraban Singh* [3] attachment in this case also may sever the interest of the absconding member.

Subrahmania Aiyar v. Sellammal : I. L. R. 39 M. 843.

We must confess we are not quite convinced that *Dalgleish* v. *Damodar Narain Chowdhry* [4] was wrongly decided though *Moideen Hadjiar* v. *Pitchey* [5] is for the reasons stated, not an authority on the Section of the code as it stands. In the first place, one does not see why the value of the subject-matter of a suit must be determined as at the date of the institution of the suit rather than as at the date of the decree. In the second place, the claim with respect to mesne profits is not quite on the same footing as the claim for interest. The claim for interest forms an integral portion of the claim for money but its award is wholly in the discretion of the Court. Not so, however, mesne profits. They form a *distinct claim* and are not, at any rate under the new code, in the discretion of the court. Even under the old code, the discretion

1. (1847) 4 M. I. A. 246. 2. (1867) 11 M. I. A. 223.
3. (1890) I. L. R. 18 Cal. 157 P. C. 4. (1906) I. L. R. 33 C. 1286.
5. L. R. (1893) A. C. 193.

was only as to whether the court should in the action for possession itself, award mesne profits or leave the party to a fresh suit; it could not in its discretion disallow the claim. Though under the old code there might have been situations in which they might not be regarded as part of the subject-matter of the suit, (being so only at the discretion of the court), under the new code, they would distinctly be so—not subject-matter at the date of the suit for the obvious reason that there was no cause of action at the time, but becoming such during the course of the suit, as and when they accrue due. Any other view is likely to lead to anomalies.

This aspect of the case could be enforced by a reference to the state of affairs under the old Code. It was clearly optional with the party to press his claim for future mesne profits (we do not concede that the new Code has made a difference but there are some cases which have taken that view). Suppose he got a decree for possession and did not press for a decree for mesne profits but sued separately for them. Could it have been contended in those circumstances that the decree for possession did not involve indirectly a claim to the mesne profits. Take again a case under the new code where a preliminary decree for possession is made and an appeal is filed therefrom. Clearly the preliminary decree involves a claim to mesne profits. It would be in the highest decree anomalous that the mode of prosecuting or dealing with a claim should affect the right of appeal.

Vijaya Ramayya *v.* Venkatasubba Rao: I. L. R. 39 M. 853.

An agreement to refer to arbitration is undoubtedly "an agreement with reference to the suit" and would be voidable at the instance of the minor if entered into by the *guardian ad litem* without leave of the court but it is an altogether different question whether apart from proof of gross negligence or fraud of the *guardian ad litem*, the fact that the guardian ad litem has not agreed to the reference, or that he has not obtained leave of the court is a ground on which the award passed in pursuance of the reference can be collaterally impeached in a suit. A reference outside court though in respect of a pending suit, when an award follows, may be viewed as an adjustment for the purpose of being recorded under order 23, r. 3 but it would seem hardly legitimate to so regard the award when it has been passed in pursuance of

the order of the court on the basis of the agreement of reference and a decree has also followed. There cannot be any pretence that an adult party to a suit can set aside an award on the ground that he was not a party to the reference when he has not chosen to put forward the objection in time before the court. It is difficult to see how a minor's case differs. If the award is sought to be put in only as an adjustment, it may well be the minor, may take the objection in a separate suit. But assuming that the minor, could take the objection it is perfectly clear that the fact that the reference is beneficial to the minor does not signify *Subrahmaniam Chettiar* v. *Rajarajeshwara Dorai* [1] and also that the old suit must be proceeded with from the stage at which the reference interrupted its further progress *Khajooroonissa* v. *Rowshan Jehan* [2].

In this case their Lordships hold that the previous suit being one for partition, the whole suit would have to be re-opened. But is this consistent with *Jamna Bai* v. *Vasanta Rao* [3] ?

Dharmaraja Ayyar *v.* Srinivasa Mudaliar : I. L. R. 39 M. 876.

An application to extend the time for payment of the mortgage amount is an application in a pending suit and as it does not relate to execution no appeal lies from an order extending the time. And order to that effect can however be made only by the first Court and not by the Appellate Court which passed the preliminary decree though it is open to the Appellate Court while making its own decree to provide for a fresh period for payment. It has been uniformly held that S. 148, Civil Procedure Code, has no application to cases where a period is fixed by the decree for the payment of money made payable thereunder.

Velayutham *v.* Subbaroya : I. L. R. 39 M. 879.

We feel some difficulty in accepting the judgment in this case as correct. If the case were an ordinary one under Art. 141 or 144, there is no denying there is considerable force in the reasons given for holding that the plaintiff was not barred. But here the case being one under Art. 134, the question of adverse possession or otherwise did not matter and there was also difficulty in applying the presumption that the possession of one co-owner is the possession of the others as well to the case as the

1. (1916) I. L. R. 39 M. 115 (P.C.) 2. (1877) I. L. R. 2 C. 184.
3. (1916) I. L. R. 39 M. 409. (P. C.)

co-owner in question was a mortgagee and so far as his actual possession was concerned, it could not be for his co-owners. The rule in question is not a rule imposing a disqualification but only raises a presumption. It is open to a co-owner to enter upon land adversely to his co-owners as well as during possession to set up adverse right. Equally it must be that if on the facts it is impossible to raise the presumption in a particular case; there is no compelling rule that the presumption should be raised. Even in cases governed by Art. 144 it must be noted that the mere fact that possession ceases to be adverse will not do in the absence of acknowledgment of title with the formalities required by S. 19 or a notional restitution of possession analogous to the case of sudden submergence of land or a fresh and independent cause of action. If the present case were one governed by Art. 148 uncomplicated by Art. 134 and more than 60 years had elapsed from the date fixed for redemption, there could be no pretence that the fact of co-ownership would have saved the plaintiff's right to redeem; it is difficult to see how a different rule can be applied to Art 134. In *Soni Ram's case* [1] during part of the limitation period (that was a case under Art. 148) the mortgagee was in possession as vendee from the widow and it was argued for the reversioner that during that period, the mortgagee was in possession rightfully and could not be redeemed and therefore he had a fresh cause of action to redeem on the death of the widow or that he was entitled to deduct the period during which the mortgagee was in possession as such vendee. Their Lordships refused to give effect to the contention pointing out the incompatibility of the rule of suspension with the Indian Limitation Act.

But another question. In this case there was a decree against the mortgagee in favour of the reversioner that he was entitled to redeem after the death of the Widow. The frame of the decree was no doubt anomalous but would it on that account be any the less *res judicata* against the defendant who claimed *through the mortgagee*. The rule of *res judicata* the Privy Council has held in *Harinath Chatterjee* v. *Mothurmohun Goswami*, [2] is not affected by the change in the rule of limitation. That was a decision in favour of the person in adverse possession and against the reversioner, and why should a different rule obtain *against* the person in adverse possession?

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1. (1918) I. L. R. 35 A. 227. (P. C.) 2. (1893) I. L. R. 21 C. 8.

NOTES OF INDIAN CASES.

Errikulappa Chetty v. The Official Assignee: I. L. R. 39 M. 903.

The conclusion in this case is right. But for S. 53 of the Presidency Insolvency Act (corresponding to S. 34 of the Provincial Insolvency Act) short of a payment order, the creditor should lose his remedy in execution against any portion of the judgment-debtors' assets. In this case there was no question of realisation of assets in execution, the only question being whether the creditor had become a secured creditor. It would be anomalous as pointed out by their Lordships that a creditor who would not be entitled to any preference if he had attached before judgment should have such preference in respect of a security given for the production of goods *to be* attached.

Ramdas Vithaldas Durbar v. Amerchand and Co: I. L. R. 40 B. 630 (P. C.)

Commenting upon the decision of the High Court in this case, we pointed out that while the conclusion was unexceptionable, the ground of decision was not satisfactory (27 M. L. J., Notes 55). We are glad to find that the Privy Council have put the matter on the sounder ground that the applicability of Ss. 102 and 103 of the Contract Act to the transfer of any particular document must be decided with reference to the usage obtaining in the ordinary course of business in connection with such a document. Their Lordships practically recognise that the Contract Act in this respect laid down the law in wider terms than the rule then obtaining in England, anticipating the change effected by the Factors' Act of 1877. The decision in *G. I. P. Railway* v. *Hanmandas*, [1] must now be taken as definitely overruled. The possibility of a distinction suggested by Sargent, C. J. between the definition of 'documents showing title to goods' for the purpose of S. 102 and that for the purpose of S. 108 is clearly negatived by their Lordships. The question of the effect of the enumeration in Sec. 137 of the Transfer of Property Act, apart from commercial usage in respect of any particular document, is left open.

1. (1889) I. L. R. 14 Bom. 57.

Ismail Allarakhia *v*. **Dattatraya R. Grandhi**: I. L. R. 40 B. 638.

We have little doubt as to the correctness of the conclusion arrived at by the Appellate Court in this case but it seems to us that the decision might well have been rested on a broader ground than that actually taken. A, the holder of what purports to be a mortgage by B of properties belonging to B, assigns the mortgage to C for valuable consideration. Both A and C believe at the time that the mortgage had really been executed by B but it is afterwards found that the executant was a brother of B who had personated B, himself having no interest in the mortgaged property. On discovering this, C sued A to recover the money paid by him for the assignment, on the footing of a failure of consideration. Macleod, J. in the first instance dismissed the claim applying the rule of 'caveat emptor.' On appeal the learned Judges avoided deciding the general question thus raised and preferred to base their judgment on the following special facts. At the time of the assignment, C had insisted that the mortgagor should be a party to the assignment to concur in the transfer and this was complied with by the brother once again personating the nominal mortgagor. The learned Judges say that the assignment not having been executed in the manner contemplated by the parties, that is, by the participation of the person therein described as the mortgagor, the case must be dealt with as one of a claim made *before* completion of the contract by conveyance and applying Ss. 20 and 65 of the Contract Act they held that A was bound to repay the transfer money. We venture to doubt if the learned Judges are not straining the facts to bring the case within the rule in *Johnson* v. *Johnson*, [1] and avoid deciding the larger question.

The principle of *Johnson* v. *Johnson* [1], as well as of the passages quoted by the learned Judges from Sugden and Dart is, that the right of the buyer to claim repayment of the purchase money on the ground of want of title in the vendor ceases with the execution of the conveyance and that thereafter his remedies are governed by the covenants in the conveyance. The question will be found discussed at some length in the judgment of Malins, V. C. in *Allen* v. *Richardson*, [2] and of Justice Grove in *Clare* v. *Lamb* [3]. In the latter case it was laid down to be the "general

1. (1802) 3 B. & P. 162.
2. (1879) L. R. 13 Ch. D. 524.
3. (1875) L. R. 10 C. P. 334.

doctrine" that the rule of *caveat emptor* applies to all completed sales, in the absence of a covenant for title, and in the former, the rule of the English law was stated to be, " that when a man sells a property it should be the duty of the purchaser to investigate the title and he must do so and satisfy himself before completion."

We are not quite satisfied that the learned Judges of the Bombay High Court are right in holding that the omission of the mortgagor to join in the assignment for the purpose of "confirming the covenants in the mortgage deed," or assenting to the transfer of the mortgage amounts to a 'non-completion' of the conveyance as between transferor and transferee, so as to bring the case within the above rule. If the learned Judges were prepared to hold that in the case before them there was a mutual mistake, "as to a matter of fact essential to the agreement," we do not think it was necessary for them to endeavour to bring the case under the rule in *Johnson* v. *Johnson* [1]. For even under the English law the better view would seem to be that where there is a common mistake of *fact* as to title, the purchaser may recover his money even *after* the contract had been completed (see Dart's Vendor and Purchaser, 7th Edition, p. 161. *Jones* v. *Clifford* [2].) But as suggested at the outset we venture to think that the case might well have been decided on the ground that the rule of *caveat emptor* has no application in India to such cases and that the plaintiff was entitled to succeed on the covenant implied by S. 55 (2). of the Transfer of Property Act. It is scarcely necessary to point out that the requirement of the English common law of an express covenant for title does not hold good in India and cases like *Bree* v. *Holbeck*, [3] and *Cripps* v. *Reade*, [4] are no safe guides in this country. As to *Clare* v. *Lamb*, [5] the ground on which *Hitchcock* v. *Giddings*, [6] is there distinguished suggests that once the sale is complete the purchaser cannot claim to get back his money even if the property sold had as a matter of fact, ceased to exist at the time of the sale, both parties being ignorant of that fact. This is certainly not the law in India. We cannot follow Macleod, J., when he says that the case now under discussion

1. (1802) 3 B & P. 162.
2. (1876) L. R. 3 Ch. D. 779.
3. (1781) 2 Doug. 654 a.
4. (1796) 6 Term. R. 606.
5. (1875) L. R. 10 C P 859.
6. (1817) 4 Price 135.

was not one of sale. If it can be regarded as a case of sale for the purposes of applying either the rule in *Bree* v. *Holbeck*, [1] or that in *Johnson* v. *Johnson*, [2] we do not see any difficulty in viewing it as a sale for the purpose of S. 55 of the Transfer of Property Act; for even under the English law the rule of *caveat emptor* was not applicable to all transactions. (See *Cripps* v. *Reade* [3] where Kenyon, C. J. excludes a mortgage from that rule).

Tangya Fala *v.* Trimbak Daga : I. L. R. 40 B. 646.

On the question of subrogation raised in this case, the Judgment of Batchelor, J. seems to us somewhat too broadly expressed, but on the facts appearing from Justice Shah's Judgment there can be no question as to the correctness of the decision. The original mortgage comprised several items, two of which alone were purchased by a stranger in execution of a money decree against the mortgagor. Nearly two years after this purchase the mortgage decree is put in execution and the mortgagor borrowed money from the present plaintiff to pay off the amount of that decree. The question was whether in consequence of such payment the plaintiff acquired a charge on the items already purchased by the defendant in execution of the personal decree. As pointed out by Shah J., the mortgagor by himself paying the whole amount of the mortgage could have a charge on the items purchased by the defendant and as a person owning the other items he was clearly interested in arranging for the discharge of the mortgage. But if Batchelor, J's. judgment is meant to imply that even in cases in which *all* the items comprised in the mortgage have been purchased by a stranger, the mortgagor could by borrowing from a stranger to pay off the mortgage debt enable such stranger to acquire a charge over the properties in the hands of the purchaser, the proposition seems to us open to doubt. In the case supposed the mortgagor may still be interested in paying off the mortgage debt because of his continuing personal liability. But we are not sure that that circumstance will suffice to entitle the third party advancing moneys to him for that purpose to claim the benefit of the rule of subrogation; we must however admit that *Butler* v. *Rice* [4] goes even further.

1. (1781) 2 Doug. (K. B.) 654.
2. (1802) 3 Bos. & P. 162.
3. (1876) 6 Term. R. 606.
4. (1910) L. R. 2 Ch. 277.

Kahsibai v. Tatya: 40 B. 668.

This case differs from the familiar type of ante-adoption agreement cases in that the adopted son was *sui juris* at the time of the adoption and no question therefore arose of the natural father's power to represent him or the reasonableness of the arrangement. One peculiar circumstance in the case however is that under the arrangement no properties were secured to the adopting widow herself but, by a will executed by the widow simultaneously with the adoption, certain items were devised to her granddaughter, this will being attested by the adopted son. In the deed of adoption the properties of the husband other than those comprised in the will were alone mentioned as devolving on the adopted son. The learned Judges look upon the whole transaction as a family arrangement and treat the widow's will not as operative by itself but as merely evidentiary of the family arrangement. The decision is certainly equitable but we are not sure that the case is free from difficulties of legal theory.

The omission of the disputed items from the deed of adoption will not of itself suffice to prevent their vesting in the adopted son as a *legal consequence* of the adoption. It cannot be said that these items continued to vest in the widow, for there was no such arrangement or reservation; nor can it be held that they immediately vested in the grand-daughter, because, in view of the will of the widow, whether treated as the root of title or as merely evidentiary, the grand-daughter cannot claim them during the widow's life time. The result therefore is that they must be held to have vested *by law* in the adopted son; and it is, to say the least, singular to allow properties so vested in the adopted son to be divested *in futuro* by the widow's will. It is this anomaly that the learned Judges seek to get over by basing the grand-daughter's title not on the will but on the family arrangement. This is obviously straining the position. Suppose the widow chooses to revoke the will; can it still be contended that the grand-daughter will nevertheless be entitled to the properties? Or, can it reasonably be suggested that though the widow, for reasons best known to herself, chose to make only a will, she has some how lost the power of revoking it because the adopted son has consented to it or the Court chooses to call it a family arrangement?

Kashinath v. Dhondshet, I. L. R. 40 B. 675.

Even if one should give full effect to the decision of the Madras High Court in *Rajah of Vizianagaram* v. *Dantivada Chelliah*,[1] the present case is distinguishable and the learned Judges have, if we may say so, come to the right conclusion. See *Rama Pal* v. *Prakash Chandra* [2]. A judgment debtor, after allowing certain lands to be sold in execution of a decree against him, brings a suit to recover possession of the same from the purchaser on the ground that being occupancy lands they could not legally be sold. The first step in this claim was to show that they were 'occupancy lands;' and as the learned Judges say, this objection ought to have been taken when it was sought to bring the lands to sale. It is a matter for consideration whether the general prohibition in O. 21, R. 92, (3) debarring a suit to set aside an order confirming a sale will not of itself cover a case like the present; but the learned judges have not dealt with the matter from this point of view. In the Madras case, when the question was raised in the course of execution, it was somehow *admitted* that the lands in question were 'Service Inam lands' and hence their unsaleability was hold to follow as a necessary consequence, in spite of the decree for sale. Whether even on this footing, that decision is not open to question, we need not discuss here.

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1. (1904) I. L. R. 28 M. 84.

2. (1916) 32 I. C. 757.

NOTES OF INDIAN CASES.

Krishnan Kidavu v. Raman : I. L. R. 39 M. 918.

Appointment of an agent with however wide powers cannot preclude the principal from acting in the matter and the renewal taken by the principal in this case was properly held binding on the tarwad though in a proper case, as a part of a family arrangement, the karnavan may agree not to act except through as agent appointed by the family conjointly as a result of which his own act might not bind the tarwad. Delegation in the sense of appointing an acting Karnavan with all its implications, guardianship and personal control, discretion in the distribution of family income and non-accountability must in the nature of things be impossible whether to a stranger or to a member of the family. An acting Karnavan called a *de facto* manager coming in by his right as the next junior by reason of the non-exercise of his rights by the Karnavan *de jure* (not amounting to an absolute renunciation by the latter) is assumed in many cases to be a possibility though the rights and duties of such a *de facto* Karnavan have not been accurately delimited. The rest is agency pure and simple which does not take away the rights of interference by the karnavan and cannot extend to his rights and duties as karnavan. Appointment of an agent is an act permitted to him just as the appointment of a servant is. If he purports to confer upon the agent powers he cannot confer, though ineffectual to clothe the agent with the powers and immunities of his principal it may nevertheless be an improper act that may go against him in a suit for his removal from the karnavanship.

Vyaravan Chetty v. Srimath Deiva Sikamani Nataraja Desikar : I. L. R. 39 M. 939.

There is an impression abroad that equitable set-offs are exempt from all rules of limitation. Their Lordships have, we think, accurately indicated the limits of the exemption. The exemption properly applies wherever the question is one of deduction, appropriation or defence or arises as a part of a general account in a case of accountable relationship. In other cases, equity follows the law.

Chanton v. Mathee : I. L. R. 39 M. 957.

While having regard to the sanction by which non-compliance with the direction to pay maintenannce is enforced, we should think too liberal a construction of the section is to be deprecated, the construction suggested or rather which the words used in the Judgment suggest though not the actual decision goes too far. We think that the section must apply to all cases in which the child is *in fact* unable to maintain itself. That charitably inclined persons may most probably feed the child cannot obviously be a ground for disallowing maintenance. Nor again the right to proceed against certain property be properly considered a ground for dis allowing it. A legal right cannot feed a child. The test ought to be, we think, actual possession of the means necessary; at least the means ought to be readily available.

Subbiah v. Rama Reddi ; I. L. R. 39 M. 959.

Their Lordships rightly held in this case that the covenants of the mortgagor to pay the public charges on the land cannot bind person who has acquired the equity of redemption by adverse possession. The confusion comes from the failure to realise the simple fact that S. 28 of the Limitation Act does not confer rights but only extinguishes them. The rule that possessory title is good against the whole world except the true owner operates in effect to make the position of the person in possession as secure as that of the true owner whose rights are extinguished but the true legal theory should not be forgotten lest one should apply all the implications of a conveyance in fact to the "*Statutory conveyance*" under this section.

Singa Reddi v. Subba Reddi : I. L. R. 39 M. 987 (F. B.)

The curious result of *Atchuta Menon* v. *Atchutan Nair* [1] was to make the penalty for withdrawal more far-reaching than for a dismissal of the suit on the merits. We think the Full Bench did right in overruling 21 Mad. 35.

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1. (1897) I. L. R. 21 M. 35.

NOTES OF INDIAN CASES.

Sivasubrahmanya *v.* Subrahmanya Ayyar: I.L.R. 39 M. 997.

The decision in *Abdulla Beari* v. *Mammali Beari* [1] was decided at a time when the view that prevailed with reference to provisions for payment of purchase money to third parties was that the vendor's only right was to be indemnified in the event of loss. In that view, the facts in *Abdulla Beari* v. *Mammali Beari* [2] would bring the case within the class of transfers indicated by the Privy Council in *Webb* v. *Macpherson* [2] as not giving rise to the Vendor's lien, *viz.*, transfers in consideration of a covenant to pay. But that is not the view now held and the case is rightly overruled.

Nachimuthu Chetti *v.* Muthusami Chetty: I.L R. 39 M. 1006.

This case as observed by their Lordships is governed by the reasoning of the Full Bench in *The Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* [3] and is undoubtedly within its mischief.

Nanda Lal Roy *v.* Abdul Aziz. I. L. R. 43 C. 1052.

The point for decision in this case arose under S. 78 of the Transfer of Property Act, in connection with the competing claims of (i) a vendor who had been given a mortgage on the property for the balance of his purchase money and (ii) a subsequent mortgagee from the vendee who had advanced moneys without notice of the prior charge and on the strength of the possession of the property and the title-deeds by the vendee.

For one reason or another, it is quite common in this country to find that when two documents are executed on the same day, between the same parties and in respect of the same property, the one avoids all reference to the other. Again recitals as to the passing of consideration are not always so worded as to give a correct idea of what has happened and the system of conveyancing or investigating title is far from well developed or widespread. The result is that more often through recklessness than by any fraudulent intent one party makes it possible for another to perpetrate a fraud on a third and courts of law cannot ignore these habits of the people when they are frequently called upon to decide which of two innocent parties is to suffer for

1. (1910) I. L. R. 33 M. 446. 2. (1904) 31 I. L. R. C. 57 (P. C.)
3. (1909) I. L. R. 32 M. 258. (F. B.)

the result of the fraud. Hence it is that the application of the test of 'gross neglect' to the particular facts of any case is by no means simple and this accounts in some measure for the apparent differences amongst judicial precedents. While every case reiterates that the question is one of 'fact', judges have been so much in the habit of drawing certain inferences, almost as 'necessary inferences', from certain circumstances that some rules almost in the nature of 'legal' presumptions have grown up. One of them arises in connection with 'registration'; on this point some Courts in India hold that the registration of a document is by itself notice thereof to parties subsequently dealing with the property, but the doctrine of notice not being directly referred to in S. 78. Registration or search in the registrar's office is relevant in the present class of cases only as bearing on the general question of "gross neglect" on the part of the prior mortgagee or as disentitling the later mortgagee to any equity on the ground of his own neglect. The omission to secure possession of the title-deeds is generally the basis of the charge of neglect. Comparing the present case with the decision of the Madras High Court in *Rangasami* v. *Annamalai* [1], it will be noticed that in the former the omission to take possession of the title-deeds is given greater importance than in the Madras case, presumably because of the fact indicated by Mr. Justice Imam in the course of the argument, that the suburbs of Calcutta where the transactions in question took place are 'very much affected by the practice prevailing on the original side.' But in *Manindra Chandra* v. *Troyluckho Nath* [2], though it was a case on the original side, Jenkins, J. (as he then was) refused to regard it as gross negligence on the part of a registered mortgagee to leave the title-deeds with the mortgagor.

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1. (1907) I. L. R. 31 M. 7.
2. (1898) 2 C. W. N. 705.

NOTES OF INDIAN CASES.

Ramachandra Bhanj Deo. *v.* Secretary of State for India : I. L. R. 43 C. 1104 (P. C.)

With reference to the remark in this case that the 'High Court was not at liberty to disregard the finding............on the ground that the District Judge gave no reasons for coming to this findirg,' we are constrained to observe that the strong and wide language employed by their Lordships of the Judicial Committee in insisting from time to time upon the limitations imposed by law upon the powers of a court of 'Second appeal,' is likely to encourage a habit, by no means uncommon, in subordinate courts of appeal, of couching their findings of fact in general language, without bestowing on the case the amount of care and attention necessary to record a full and complete Judgment of their own. It is certainly not sufficient that there is evidence in the case to support the conclusion of the lower appellate court; it must also appear that that court had considered it. That is why the code provides that the appellate judgment 'shall state' the points for determination......and the reasons for the decision.' The law makes no distinction between a 'confirming' Judgment and a 'reversing' Judgment. It may no doubt be said, and with reason too, that an appellate, court when it is substantially in agreement with the Judgment of the court of first instance need not repeat the reasons contained in it in its own Judgment. But even this cannot justify the appellate court in expressing its general agreement without indicating clearly that it has applied its own mind to the case. And with all respect to their Lordships, we fail to see why the omission of the appellate court to observe the duty cast upon it by the code in this respect should not be regarded as an 'error or defect in procedure.'

Re Maddela Ramanujamma: I. L. R 39 M. 977.

Although it is difficult to approve of the method adopted in this case of getting rid of the authority of a Full Bench, *viz.*, of counting up the number of judges that are and have been against the

ruling in and out of the Full Bench, we think that it is possible to distinguish the Full Bench decision for we do not think that the word confession is used in the same sense in S. 25 of the Evidence Act and S. 164 of the Cr. P. Code. It is possible, we think, to give a narrower interpretation to that term as used in S. 164 by reference to the nature of the investigation in the course of which or before trial in connection with which, the confession is made. If it is admission of one of the offences forming the subject-matter of the complaint, investigation, inquiry or trial, the statement must be taken to be a confession not otherwise. There is no duty cast on the magistrate to record a confession nor is there any prohibition of the use of a confession not recorded. S. 25 strikes at the use of confessions altogether for whatever purpose however made or recorded. Obviously it has a wider object and the interpretation of the Full Bench is made in deference to this object. Suggestion that when a man is convicted on a charge for making contradictory statements he is not convicted on the basis of the truth of his statement is, we must confess, somewhat unconvincing.

Hakeem Patte Muhammad *v.* Shaik Davood: I. L. R. 39 M. 1010.

It may well be doubted if the legislature intended this result. S. 60 purports to apply to all mortgages and saves no contract to the contrary. Some of the subsequent sections also deal with mortgages generally while others deal with specific kinds of mortgages. S. 98 coming at the end of all these provisions provides for certain classes of mortgages which are described as anomalous mortgages and says that the rights and liabilities of the parties in the case of such mortgages are to be determined by the terms of the contract as evidenced in the mortgage deed and on points not covered by the contract, by local usage. The question is whether this section preserves contracts in such mortgages clogging equity of redemption. If the application of S. 60 is excluded by this section, those contracts would be saved. We have grave doubts if anything more was intended by the section than to enact that while the incidents of the mortgages specified, are to be determined by the express pre-

scriptions in the Transfer of Property Act in the case of these mortgages, they are to be determined by the contracter local usage. It could not have been intended for instance, that Ss. 61, 69 or 82 should not govern these mortgages. Having regard to the very unsatisfactory definition of mortgage by conditional sale in the Transfer of Property Act, this construction of S. 98 is full of dangerous possibilities and has carefully to be scrutinised. *Ramayya* v. *Guruva* [2] relied upon do not seem to decide the point. On the facts of the case, we cannot quite see why the document should not have been construed as containing a personal covenant. The language is not dissimilar to that of *Kangaya Kumkal* v. *Kalimuthu Ammayi* [3].

Yella Reddi *v.* **Syed Muhamad Ali** : I. L. R. 39 M. 1026.

As pointed out by their Lordships, *Vaidyanathasami Iyer* v. *Somasundram Pillai* [4] seems to have been misunderstood in *Ramasami Naicker* v. *Ramasami Chetty* [5]. Moreover, a payment by a party to himself cannot appropriately be called "payment" within the meaning of the section. *The Secretary of State* v. *Fernandez* [6]. Whether apart from provision in the decree, the defendant (mortgagee) could be made to account for the profits is another question and did not arise in the case.

Krishnasami Naidu *v.* **Seetha Lakshmi Ammal** : I. L. R. 39 M. 1029.

The donors were not bound to maintain the descendants of the illegitimate son and as such the gift could not have been intended for their benefit also.

Subbamma *v.* **Subrahmanyam** : I. L. R. 39 M. 1035.

The widow having validly exercised her power to alienate for life, any surrender by her subsequently could destroy only her remaining interest and could not affect the alienees. The reversioners take only what remains.

1. (1906) I. L. R. 30 M. 61.
2. (1890) I. L. R. 14 M. 232.
3. (1903) I. L. R. 27 M. 526. (F. B.
4. (1904) I. L. R. 28 M. 473 (F.B.)
5. (1906) I. L. R. 30 M. 255.
6. (1907) I. L. R. 30 M. 375.

Tiruvengada Konan v. Venkatachala Konan : I. L. R. 39 M. 1042.

Though this case makes the most plausible suggestion so far made for relieving the situation created by the Full Bench decision as to adverse possession, it can by no means be unhesitatingly affirmed that the use made in it of Order 21 R. 36 is legitimate. The section *prima facie* has reference to occupation by a party entitled to hold it and not a party who is not entitled to hold it or holds it adversely to the plaintiff. Symbolical possession of a right which does not involve the perception of any benefit from the land or from the party in occupation of it (for no action would lie at the instance of the landlord as against the trespasser for rent), is a misnomer.

NOTES OF INDIAN CASES.

Seshagiri Rao v. Hanumantha Rao: I. L. R. 39 M. 1031.

The suit being properly constituted as to parties, and there being no provision of law casting upon the plaintiff the duty to amend the pleadings when the defendant comes of age, we think the decision of the learned Judges that the decree was not without jurisdiction is right. We are not quite so certain that if the suit were against a major as a minor even then the proceedings would not have been without jurisdiction. The decision of the Privy Council in *Rashid-un-nissa* v. *Muhammad Ismail Khan*[1] is based on the ground that a minor without a guardian *ad litem* is not properly constituted as a party and is not put on the ground of any tender solicitude of the Courts for minors. Apart from any question of estoppel or acquiescence, we do not see on principle any distinction between the major described as a minor and a minor described as a major. *Ramachari* v. *Dorasami Pillai*[2] was passed at a time when the law as to minors not properly represented was not settled.

On principle some distinction ought also to be made between the ordinary case of a minor coming of age pending a suit or appeal and a case in which an occasion arises for taking notice to him after his attaining majority. In cases where the notice is compulsory, it may be the notice served on the guardian is wholly ineffective but where nothing of the sort is to be done, it is not clear why the decree should not be binding absolutely. When the minor comes of age, it is his duty to take up the conduct of the case and even if the other side is technically guilty of any omission in not amending the record, it is an irregularity which can under no circumstances hurt him.

Michael Pillai v. Rt. Rev. Bartle: I. L. R. 39 M. 1056.

Assuming that it is permissible for the founder of a Catholic Church to impose at the time of dedication certain conditions overriding the superior authority and power of the Bishop and the Pope in specified matters, where nothing is known about the terms of dedication except that the edifice was intended to be used as a Catholic Church, the only presumption

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1 (1909) I. L. R. 31 A. 572. (P. C.) 2. (1898) I. L. R. 21 M. 167.

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that can properly be made, having regard to the Catholic doctrine about the supremacy of the authority of the Pope and the Bishop in matters spiritual as well as in matters relating to the administration of the temporalities of the church, is that usages, whatever they are, and however long, are liable to be superseded by those authorities. It is very much to be doubted if it is proper to regard a donation to the church as a case of dedication; it is more a case of gift to a corporation known as *the church*. There may be legal difficulties in accepting this position in countries where foreign corporations are not recognised or corporations can be created only in specified ways. There are no such difficulties here in India.

Subrahmania Chettiar v. Kadiresan Chettiar: I. L. R. 39 M 1081.

The amendment by the Act of 1908 makes it perfectly clear that the legislature approves of one set of decisions and not the other.

Venugopal Mudali v. Venkatasubbiah Chetty: I. L. R. 39. M. 1196.

If the appellate order had set aside the order of the Lower Court, there could be no question but that it would be an order under O. 21 R. 58. Why should it be otherwise when the appellate order merely confirms the order of the Lower Court? As observed by the Privy Council in *Bassu Kuar* v. *Dhum Singh*[1], it should be "a very inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not." Courts have not always borne this aspect of the case in mind. Happily in this case a solution in accord with the true theory of law was found.

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1. I. L. R. 11 A. 47.

NOTES OF INDIAN CASES.

Radha Kunwar *v.* **Reoti Singh**: I. L. R. 38 A. 488 (P. C.)

Their Lordships' judgment in this case is clear authority for the position that in a suit for sale upon a mortgage, persons claiming adversely to the mortgagor and the mortgagee cannot be made parties. The case their Lordships had to deal with was the simple one of a stranger setting up a hostile title and their Lordships' judgment cannot be taken as authority for the further position that where even the mortgagor's interest has been acquired by adverse possession by a stranger, the latter cannot be made a party, It is also doubtful if the case can be taken as an authority equally applicable to redemption actions though the reasoning would seem to point to its being so. For their Lordships say at p. 493, "The confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims has been joined with another which was quite distinct, the *enforcement of rights* under a mortgage". A suit for redemption is as much a suit for enforcement of rights under a mortgage as a suit for sale. But such a view specially having regard to the fact that there may be adverse possession both against the mortgagor and the mortgagee, may have disastrous consequences.

The rule will not of course preclude the defence of the mortgagee defendant of his representative, where he is not estopped that the plaintiff had no title to convey and as such is not entitled get possession. We fancy that the mortgagor or his representative also will not be precluded unless some rule of estoppel comes in and prevents him from raising the plea. In fact whether a party is to be precluded from raising a defence, is more a rule of estoppel than of joinder. In appropriate cases, Order 2, R. 4 may be called in aid to relieve the situation. The judgment will not operate as constructive *res judicata* in cases where the plea is precluded as the hostile title will not be a matter which might and ought to have been made a ground of defence or attack. The only safe course for a defendant properly a party who has a hostile title to plead is to plead it lest he should be prevented from relying upon it as against an innocent purchaser in execution, though it could not be gone into in the action. It would be a great hardship to require him to elect between being dismissed rom the action so as to be able to rely on his title and giving up

his title if he wants to oppose the action on the mortgage on a defence appropriate to such an action.

Ahamed Raja v. Abid Husain: I. L. R. 38 A. 494 (P. C.)

The distinction between a recital of a transaction and the record of a transaction is well known; the only difficulty being in determining as to when it is the one and when the other. In this case their Lordships hold that the petition of compromise only recited a mortgage transaction and therefore did not require to be stamped as such. *Prima facie,* a petition must be taken only to recite the transaction and not to record it, at any rate when as in this case, writing was not necesary for the *validity* of the transaction.

Dhanraj Singh v. Lakhrani Kunwar: I. L. R. 38 A. 509.

The final judgment in this case enunciates no novel principle. S. 47 is obviously not a bar to a suit based on a cause of action arising subsequent to the previous suit, in fact after the decree. Not so however the judgment of the single judge against whose judgment it was an appeal. The learned judge holds that a suit can be brought on the decree of an Indian Court directing delivery of possession as against the parties to the decree. If that is the correct law, the situation may, as the appellate judges say, be very alarming. But that conclusion is opposed to the wording of S. 47, C. P. Code and has not been accepted in *Periasami Mudaliar* v. *Seetharama Chettiar* [1] and *Merwanji Nowroji* v. *Ashabai* [2] though where S. 47 does not present a bar, an action can undoubtedly be brought to enforce the obligation imposed by the decree.

Jhanda Singh v. Wahid-ud-din: I. L. R. 38 A. 570 (P. C.)

This branch of the law is far from being satisfactory. A mortgage by conditional sale is an ostensible sale and neither parol evidence of intention nor evidence of conduct, except in so far as it comes within the category of evidence of surrounding circumstances, being admissible, verbal analysis of the most microscopic character

1. (1883) I. L. R. 27 M. 243. 2. (1903) I. L. R. 8 B. 1.

is so often necessary to prevent the intention of the parties being defeated. Mortgages going under various names all over the country assume this form; in fact it is exceedingly doubtful if there are many genuine cases of sales with conditions of repurchase at all. We think that the rule laid down in some of the recent cases of this Court that after the Transfer of Property such transactions must *prima facie* be regarded as mortgages are more likely to effectuate the intention of parties than the rule to the contrary. To English lawyers, 30 year's delay in bringing the suit may no doubt look very long but in this country, it must be remembered that the period for redeeming mortgages is 60 years. To transactions before the Transfer of Property Act, the stricter rule laid down in this and the earlier cases will, of course, apply. On the facts, we have not anything very peculiar in this case. The agreement was not contemporaneous, and was also apparently not a part of the original transaction. The concession was granted out of feelings of kindness and not as a part of the business arrangement and was intended so far as the words of the deed went, to be only a personal concession. There was no covenant to pay and there was no proof of disparity between the mortgage amount and the value of the property. It is more in the observations and in the tendency that they indicate that the interest lies.

Sadik Husain Khan *v.* **Hashim Ali Khan**: I. L. R. 38 A. 627 (P. C.)

Their Lordships hold in this case that gifts through the instrumentality of trusts are as much governed by the Mahomedan Law as ordinary gifts though the Oudh Laws Act speaks only of gifts as being governed by that law and that S. 122 of the Transfer of Property Act has not made any change in that law so far as possession is required by it to accompany the gift.

Another matter of interest in the case is the reference made to the Mahomedan Law of Evidence. "It is also well established," it is said, "according to Mahomedan Law that if a member of the family such as Fatima Begum was of her husband's family, makes statements touching the sonship or heirship of a person such as are contained in many of the written documents she has signed, in reference to Sultan Mirza's heirship, those statements are good evidence of the family repute concerning

him." The law as to acknowledgment also is thus stated "the rule of the Mahomedan Law applicable to the care is well established: no statement made by one man that another (proved to be illegitimate, is his son can make that other legitimate but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person; provided his legitimacy be possible." Is it their Lordship's view that the Mahomedan Law of Evidence and not merely the substantive rules of Mahomedan Law, in respect of the matters specified are applicable? (Cf. *The Collector of Gorakhpur* v. *Palakdhari Singh* [1], *Jafri Begam* v. *Amir Muhammad Khan* [2].)

Another interesting point in the case unconnected with the Mahomedan Law is the clear distinction that their Lordships point out between an onerous gift and a transfer for consideration though the two result in much the same legal consequences when the donee elects to accept the burden. The former their Lordships say is governed by the Mahomedan Law while the latter is not. In this case, the transfer purported to be in release of the dower right of the wife. No proof independent of the deed was given that any such agreement was entered into between the parties and their Lordships say "unless and until this agreement is proved to have been entered into, the grant and conveyance to the trustees must be taken to be a purely voluntary gift. Though it should be merely voluntary, F (*i.e.* the wife) might no doubt acting with the full knowledge of her rights deliberately elect to take the benefits conferred upon her by it in lieu of the balance of her dower. If she did so elect she would be bound by the choice thus made. But that election cannot create the agreement between her and her husband which is the sole consideration for the deed nor could it enlarge the operation of the deed itself. Notwithstanding it, the grant to the trustees would still remain a purely voluntary gift and the property which it passed would have to be ascertained on that footing. Subsequent election could not be held to be a substitute for the original consideration."

In this case, the Lord Chancellor, strongly animadverts upon the delay in the disposal of the case. While by no means minimising the necessity for speedy disposal, we do not think that the same

1. (1889) I. L. R 12 A. 1. 2. (1885) I. L. R. 7 A. 822.

standard can properly be applied to Indian litigation as to litigation in England. India is a country of great distances, with comparatively poor communications. The bulk of the litigant public are poor and largely illiterate. All these are factors that must undoubtedly make for delay without anybody specially to blame in the matter. On the other hand any attempt to rush might lead to great injustice. In some parts of the country, evasion of service and procrastination are no doubt regarded as approved methods of conducting litigation but it is wholly wrong to generalise on this basis for there are large areas in which the people are not averse at all to receive notices. A part of the delay is also due to the complex family law of this country which requires the presence of a large number of persons as parties and who are not *sui juris*. The appointment of a proper guardian takes a long time. Unbusiness-like habits no doubt also contribute to some extent to the delay but so long as the general level of education is not raised, overzeal for expeditious disposal may injure the very parties whom it must be the solicitude of Courts to protect.

Kanhaiya Lal *v.* Kishori Lal : I. L. R. 38 A. 679.

There may have been other facts in the case but the facts stated are by no means conclusive on the question. A compro mise may be an alienation but is ordinarily not. Again the doubtful rights involved may be only the rights of the widow and the reversioner's rights might be unaffected by those doubts in which case, obviously the compromise cannot bind the reversion. But the mere fact that the title of the widow is admitted in the compromise cannot be decisive. The conclusion arrived at by the compromise is the result of the compromise and cannot operate as admission of the rights of the parties apart from the compromise. The plaintiff widow in the case claimed the property; the defendant claimed it as his own. A compromise was arrived at by which the widow's right was admitted but the defendant was given the option to purchase it from the plaintiff. But for the option, the defendant may not have admitted the right of the plaintiff at all. The true test should be, we think, was the estate in jeopardy or honestly believed to be so and was the compromise honestly arrived at to save it. The Allahabad Court

took a very narrow view about the widow's powers of compromising and we doubt whether the present judgment is not a survival of a somewhat doubtful value having regard to the recent pronouncements of the Privy Council.

Bhaiorn Prasad *v.* **Amina Begum** : I. L. R. 38 A. 690.

Extension of time like adjournment may be a step in aid of execution or it may be the reverse. The whole thing is a question of fact depending on the circumstances of each case. The law is no doubt rendered uncertain but it must be remembered that the uncertainty while it may occasionally help the negligent decree holder, will never hurt an innocent debtor.

Muthammal *v.* **The Secretary of State for India** : I. L. R. 39 M. 1202.

Though this case may not be within the mischief of the observations of their Lordships of the Privy Council in *Gokul Mander* v. *Puhmunand Singh* [1], we do not believe that the extent to which the Survey Officer's order is conclusive can be decided by reference to general principles of *res judicata.* In a case like this, we have no judgment of a competent Court to deal with; we have on the other hand, an *order* of a Survey *Officer* based on information from village officers and such evidence as he can procure and though in the appellate stage, we have a *decision*, the proceedings nevertheless remain proceedings of officers not of courts or tribunals. Seeing, however, that the unsuccessful party is required to *establish the right* he sets up the legislature must be taken to intend that the conclusiveness should attach not only to the order but also to the *negativing* of the right but we imagine that under no conceivable circumstances could the order be held binding except *quoad* the particular object matter, *i.e.*, the land in dispute. We have somewhat analogous cases of orders passed by courts to which, though not as cases of *res judicata* proper, certain conclusiveness is attached.

[*End of Vol. XXXII.*]

1. (1902) I. L. R. 29 C. 770.

NOTES OF RECENT CASES.

Abdur Rahim and Oldfield, JJ. 1917, January 9. — S. A. No. 1271 of 1915.

Hindu Law—Partition — Declaration of divided status — Disposition of property by the same document—Grand-father, power of, to effect a partition.

It is open to a member of a joint Hindu family to effect a severance as regards his share of the property by a unilateral declaration and as part of the same transaction and by means of the same instrument, to dispose of his share by way of gift. Under the Mitakshara Law, a Hindu grand-father can effect a fair and equal partition of ancestral property between himself and his grandsons (the sons being dead) without the consent of the latter.

T. V. Muthukrishna Aiyar and *K. S. Jayarama Aiyar* for Appellant.

Hon'ble Mr. T. Rangachariar and *G. S. Ramachandra Aiyar* for Respondents.

Abdur Rahim, and Srinivasa Aiyangar, JJ. 1917, January 11. — A. S. No. 400 of 1914.

Water—Government right to regulate irrigation—Right to enter upon mitta land without consent of owner for purposes of carrying on works of irrigation.

The paramount right of Government to regulate the distribution of water for purposes of irrigation does not empower the Government to enter upon a mitta land and carry on works of irrigation without the consent of the Mittadar.

32 M. 141 referred to.

Government Pleader for Appellant.

J. L. Rozario, E. S. Chidambaram Pillai and *P. N. Marthandam Pillai* for Respondents.

Abdur Rahim and Srinivasa Aiyangar, JJ. 1917, January 15. — A. S. No. 373 of 1915.

Hindu Law—Widow—Surrender for consideration—Validity.

A surrender by a sonless Hindu widow in favour of the nearest reversioner is valid though it was made for consideration.

31 M. 446, (1913) M. W. N. 433, followed.

T. R. Ramachandraiyar, T. V. Venkataramaiyar, P. Narayanamurti, P. Nagabushanam, and *P. M. Srinivasa Aiyangar* for Appellant.

V. Suryanarayana Rao and *V. Ramadoss* for Respondents.

Wallis, C. J.
Abdur Rahim and
Srinivasa Aiyangar, JJ.
1917, January 16.

S. A. Nos. 1643 and 1644 of 1914.

Religious Endowment—Extinction of line of trustees—Right of founder or his heirs to appoint fresh trustees.

Per *Wallis, C.J. and Abdur Rahim, J.* (*Srinivasa Aiyangar, J.* dissenting): It is competent to the founder of a religious endowment or his heirs, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees.

Per Srinivasa Aiyangar, J: Unless the power of appointment is expressly reserved at the time of the foundation, the court alone can appoint fresh trustees.

A. Krishnaswami Iyer for Appellant.

V. Ramesam for Respondent.

Wallis, C. J.,
Abdur Rahim and
Srinivasa Aiyangar, JJ.
1917, January 16.

C. M. A. No. 279 of 1915.

Civil Procedure Code, O. 1, R. 3, O. 2, Rr. 3 and 6—Specific Relief Act, S. 27—Specific performance—Contract of sale by member of joint Hindu family—Suit for execution of conveyance, partition and possession, against vendor and his co-parceners—Misjoinder of parties and causes of action.

Per *Abdur Rahim, J.* In a suit to enforce specific performance of a contract entered into by a member of a joint Hindu family to sell his share in certain family properties, it is competent to the vendee to ask for the execution of a conveyance and possession of the properties by means of a partition among the vendor and his co-parceners, impleading the latter as parties to the suit.

Per *Wallis, C. J.* (*Srinivasa Aiyangar, J.* contra). The co-parceners of the vendor were not proper parties to the suit for possession. *Tasker* v. *Small*, 3 My. and Cr. 63, followed.

Per *Wallis, C. J. and Srinivasa Aiyangar, J.* It is not competent to the plaintiff to ask for the execution of a conveyance and for possession by means of a partition, in the same suit.

T. Narasimha Iyengar for Appellant.

L. A. Govindaraghava Iyer for Respondent.

NOTES OF RECENT CASES.

Oldfield and Bakewell, JJ.
1917, January 16.

C. M. A. No. 231 of 1916.

Caste Disabilities Removal Act XXI of 1850—Scope of—Hindu Law—Hindu convert to Christianity—Descendant of—Right to succeed as reversioner to Hindu to whom he could have succeeded but for conversion.

The descendant of a Hindu convert to Christianity is not entitled to succeed as reversioner to the estate of a deceased Hindu to whom he would have succeeded but for his ancestor's conversion. 11 A. 100 diss. from. Act XXI of 1850 applies to persons who have themselves become converts and not to their descendants.

T. V. Muthukrishnaiyar for Appellant.

T. R. Venkatarama Sastriar and *K. Aravamuda Aiyangar* for Respondents.

Wallis, C. J.
Seshagiri Aiyar, J.
1917, January 23.

A. S. No. 207 of 1914.

Civil Procedure Code, O. 22, R. 4—Abatement—Suit for accounts and recovery of moneys due from agent—Death of agent—Liability of legal representative.

Where during the pendency of a suit for rendition of accounts and for recovery of money due to the plaintiff from the defendant who had acted as his agent, the latter died, *held* that the cause of action survived against his legal representatives who would be liable to pay out of the assets of the deceased, any sum proved by the plaintiff to have been misappropriated by the agent.

T. Narasimha Iyengar and *K. S. Jayarama Iyer* for Appellants.

A. Krishnaswami Iyer for Respondents.

Sadasiva Aiyar and Spencer, JJ. 1917, January 23. — S. A. No. 954 of 1915.

Limitation Act, S. 7, art. 44—Sale by Hindu mother as guardian of her only son—Son in utero *at the time of sale—Purchaser dispossessed—Suit for possession—Limitation.*

A Hindu mother executed a sale-deed as guardian of her only minor son. At the time of the sale she had another son *in utero*. Subsequently the purchaser was dispossessed by a person who had taken a conveyance from the two sons. In a suit by the prior purchaser for possession more than 3 years of the first son's attaining majority but within 3 years of the son's majori y, *held* that as no suit had been brought to set aside the sale under art. 44 of the Limitation Act the share of the first son enured to the purchaser. No sale having been executed by the mother as guardian of her second son his share did not pass by the sale and stood unaffected.

Held further that the cause of action for the two sons being different, S. 7 of the Limitation Act had no application to the case and the plaintiff was not entitled to the share of the second son.

C. V. Ananthakrishna Aiyar for Appellant.

K. Bashyam for Respondent.

Sadasiva Aiyar, and Spencer, JJ. 1917, January 23. — S. A. No. 275 of 1915.

Hindu Law—Adoption by Widow—Effect on prior alienation by widow.

Their Lordships referred to a Full Bench the question whether an alienation by a Hindu widow prior to her adopting a son, holds good during her widowhood even as against the adopted son.

Sriramulu v. *Kristamma* [1] and *Ramakrishna* v. *Tripurabai*[2] Referred to.

T. R. Ramachandra Iyer for Appellant.

K. S. Ganesa Iyer for Respondent.

1. I. L. R. 26 M. 143. 2. I. L. R. 33 B. 88.

Sadasiva Aiyar and Spencer, JJ.
1917, January 24.

S. A. No. 1252 of 1915.

Civil Procedure Code, S. 102—Second Appeal—Suit of Small Cause nature, transferred to regular side under S. 23 of the Prov. Sm. C. C. Act.

A suit of a nature cognisable by the Small Cause Court does not cease to be such within S. 102 of the Civil Procedure Code, because the plaint was returned by the Small Cause Court under S. 23 of the Prov. Sm. C. C. Act, to be filed on the regular side on the ground that the suits involved questions of title.

R. Kuppusamy Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

Sadasiva Aiyar and Spencer, JJ.
1917, January 24.

S. A. No. 835 of 1915.

Defamation—Question as to whether a certain document is defamatory, if a question of fact—Damages—Quantum of, if a question of fact.

Per Spencer, J.; (Sadasiva Aiyar, J. dubitante*)*:

The question whether a particular article in a newspaper is defamatory of the plaintiff is one for the jury and as such a question of fact with which a High Court will not ordinarily interfere in second appeal. So also is the question of the quantum of damages awardable to the plaintiff in an action for defamation.

T. Rangacharier and P. R. Ganapathi Aiyar for Appellant.

G. S. Ramachandra Aiyar for Respondent.

Abdur Rahim, and Srinivasa Aiyangar, JJ.
1917, January 25.

C. M. P. No. 2244 of 1916, and C. M. P. No. 3099 of 1916, in A. S. No. 199 and 258 of 1915.

Madras Impartible Estates Act (II of 1904) S. 4 (1) and (3)—Power of proprietor to make a will—" Default of heirs ", meaning of.

It is not competent to the proprietor of an impartible estate to make a will when there are heirs either agnate or cognate who

are entitled to succeed to him under the Hindu Law. The restriction on alienation is not confined only to cases where there are other members of the family, who if the estate were partible, would be co-parceners with the proprietor.

C. V. Ananthakrishna Iyer, for Petitioner.

The Hon. The Advocate-General and *G. S. Ramachandra Iyer* for Respondent.

Wallis, C. J. and Seshagiri Ayer, J. 1917, January 25. O. S. A. Nos. 67 and 70 of 1916.

Jurisdiction—Execution—High Court, if can transmit its decree for execution in a Native State.

The High Court has no power to transmit its decree for execution to a Native State, there being no provision in the Civil Procedure Code to enable it to do so.

The Hon. The Advocate-General for Appellant.

A. Krishnaswami Ayer, for Respondent.

Oldfield, J. Bakewell, J. 1917, January 25. C. M. A. No. 67 of 1916.

Provincial Insolvency Act, S. 6 (4) (a)—Petitioning Creditor's debt —Nature of—Debts aggregating to five hundred rupees—Debt which the debtor owes jointly with one of the petitioning creditors to another of the petitioning creditors—Whether a good petitioning creditor's debt.

A debt which the debtor owes jointly with one of the petitioning creditors to another petitioning creditor is a good petitioning creditor's debt on which the debtor can be adjudicated insolvent. Any right of contribution which the debtor may have against the joint debtor can only be taken as one of the items of his assets.

S. Varadachariar for *T. M. Krishnaswami Aiyar* for the Appellant.

C. S. Venkatachariar for the Respondent.

NOTES OF RECENT CASES.

Wallis, C. J.
and Spencer, J.
1917, January 17.

S. A. No. 1035 of 1914.

Landlord and Tenant — Permanent lease—Usufructuary mortgagee from tenant—Landlord cannot sue for rent from mortgagee—No privity of estate.

A. demised certain lands on permanent lease to B. who usufructuarily mortgaged his lease-hold interest to C. in a suit for rent by A. against B. and C.

Held, that A. had no right to sue C. for rent, as there was neither privity of contract nor privity of estate between them.

K. R. Subramania Sastri for Appellant.

T. R. Ramachandra Iyer for Respondent.

Wallis, C. J.
Sadasiva Iyer and
Seshagiri Iyer, JJ.
1917, January 18.

C. R. P. Nos. 427 to 435 of 1916.

Madras Estates Land Act, S. 3 (2) (d)—Inam—Resumability granted in inam—Tanjore Palace estate, if an 'estate'.

The Tanjore palace estate was 'granted in inam' in 1862, by the British Government to the widows of the late Raja of Tanjore. 3 M. H. C. R. 424 Referred to.

The fact that the Government have no right of reversion in the subject of the grant does not take it out of the category of "inam". Where the Kudivaram of a village forming part of the Tanjore Palace estate, has all along been with the tenants on the land; the village comes within S. 3 (2) (d) of the Madras Estates Land Act.

The Hon'ble The Advocate General and *K. V. Krishnaswami Iyer* for Petitioner.

G. S. Ramachandra Iyer and *A. V. Visvanatha Sastri* for Respondents.

Wallis, C. J. and
Seshagiri Iyer, J.
1917, January 22.

A. S. No. 128 of 1914.

Easements Act, S. 15—Easement, acquisition of, by prescription—Enjoyment under invalid grant.

S. 15 of the Easements Act is clear and excludes the applicability of the principle enunciated in *Labrador Co.* v. *R.* (1893)

A. C. 104 that the enjoyment of an easement under an invalid grant for the prescriptive period will not give a prescriptive title.

V. Ramesam for Appellants.

A. Krishnaswami Iyer for Respondents.

Wallis, C. J. and Seshagiri Iyer, J. A. S. No. 192 and 193 of 1915.
1917, January 29.

Principal and agent—Nattukottai Chetties—Suit for accounts—Specification of definite sums alleged to be improperly withheld—Limitation Act, arts. 89 and 90—Termination of agency, question of fact in each case.

Where a Nattukottai Chetty principal brought a suit against his agent for rendition of accounts, specifying in the schedule to the plaint a number of items alleged to be due to him in default of any explanation from the defendant, *held* that the suit was one for accounts and was governed by art. 89 and not by art. 90 of the Lim. Act.

Venkatachalam v. *Narayanan* (1914) I. L. R. 39 Mad. 376 does not lay down as a matter of law, the point of time at which an agency terminates, but the matter is one to be decided on the facts of each case.

Nagappa Chetty v. *Chidambaram Chetty* 31 M. L. J. 687 Referred to.

A. Krishnaswami Iyer for Appellant.

The Hon'ble The Advocate General and *K. Bhashyam* for Respondent.

Oldfield and Bakewell, JJ. C. M. S. A. No. 24 of 1915.
1916, January 30.

Civil Procedure Code, O. 21 Rr. 2 and 16—Assignment of decree—Application by assignee to execute—Plea that assignment was benami *for judgment-debtor—Uncertified adjustment, evidence of.*

Where an assignee decree-holder applies for execution of the decree, it is open to the judgment-debtor to show by evidence that the assignment was *benami* for himself and that therefore the decree is unexecutable. Evidence of facts constituting an uncertified adjustment may be received in the course of such an enquiry, the prohibition in O. 21 R. 2 C. P. Code not being applicable to the case.

T. R. Ramachandra Iyer for Appellant.

K. S. Jayarama Iyer for Respondent.

Oldfield and Bakewell, JJ.
1917, January 30.

L. P. A. No. 167 of 1916.

Contract Act, S. 23—Agreement to remunerate pleader's clerk for conducting execution proceedings, if enforceable.

Where a client engaged a pleader to conduct proceedings in execution of a decree and at the same time agreed to remunerate the pleader's clerk for attending to all matters in connection with the execution proceedings and the clerk sued to recover the moneys promised by the client.

Held, per *Oldfield, J.* That the agreement was not opposed to public policy and could be enforced. *Janson* v. *Driefontien Consolidated Mines Co.*, (1902) A. C. 484 foll.

Per *Bakewell, J.* The agreement was repugnant to Ss. 10 and 13 of the Legal Practitioners' Act and unenforceable.

V. Ramadas for Appellant.

P. M. Srinivasa Iyengar for Respondent.

Oldfield and Bakewell, JJ.
1917, January 31.

C. M. S. A. No. 4 of 1916.

Probate and Administration Act, S. 23—Application for letters of administration—Scope of inquiry — Caste custom—Appeal against order granting letters of administration—Court fee.

On the application of the divided son of a deceased Nattukottai Chetty for letters of administration to his estate, the widow of the deceased who opposed the grant, set up a will in her favour and also pleaded a caste custom under which she was a preferential heir to the divided son. The Lower Court refused to go into the question of custom on the ground that it was foreign to the scope of the enquiry under S. 23 of the Prob. and Admn. Act. On appeal by the widow against the order granting letters of administration to the divided son, *Held* that *ad valorem* court-fee need not be paid on the appeal, the case coming under Sch. ii art. 1 of the Court Fees Act.

Rodrigues v. *Mathias* (1911) 21 M. L. J. 481 followed.

Held, further, that the question as to who was the preferential heir to the deceased came within the scope of the enquiry under S. 23 of the Prob. and Admn. Act.

Raghu Nath v. *Mt. Pate Koer* (1901) 6 C. W. N. 345;

Ochavaram Nanabhai v. *Dolapam Jamaitram* (1904) I.L.R. 28 Bom. 644 Distinguished.

The Hon'ble Mr. T. Rangachariar for Appellant.

The Hon'ble The Advocate General and *G. S. Ramachandra Iyer*, for Respondents.

Ayling and Napier, JJ. *1917, February 2.* — S. A. No. 2017 of 1912.

Appeal—Right of—Application under S. 331 of the C. P. Code of 1882, registered as a suit—Passing of the new Code during pendency of suit, before decree—Right of appeal not taken away—C.P. Code (1908) S. 154.

Where a person holding a decree for possession of land applied under S. 331 of the Code of Civil Procedure, 1882, his application was registered as a suit. During the pendency of the suit and before the passing of the decree, the C. P. Code of 1908 came into force. *Held*, that there was vested in the parties a right to appeal from any decree that might be passed in the suit and that the right was not taken away by the new Civil Procedure Code.

The *Colonial Sugar Refining Company* v. *Irving* (1905) A. C. 369, *Kalinga Hebbara* v. *Narasimha Hebbara* 21 M. L. J. 631 followed.

Benod Bihari Bhadra v. *Ram Sarup* (1912) 16 C. W. N. 1015 distinguished.

A. V. Visvanatha Sastri for Appellant.

T. R. Venkatrama Sastri for Respondent.

Oldfield and Bakewell, JJ. *1917, February 6.* — C. R. P. No. 259 of 1913.

Limitation Act, S. 13—Absence from territories beyond British India—Defendant residing at Singapore—Exclusion of time.

"The territories beyond British India under the administration of the Government" has reference to those parts of India which are under the administration of the British Indian Government but not situate within the limits of British India as defined in S. 3 (7) of the General Clauses Act. A plaintiff is therefore entitled to deduct the time during which the defendant has been absent in Singapore.

G. S. Ramachandra Aiyar for Petitioner.

K. Krishnaswami Aiyangar for Respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Spencer, JJ. 1917, January 23. — S. A. No. 272 of 1915.

Landlord and Tenant—Agricultural lease with annual rent reserved—Reasonable notice to quit—What is.

There is no hard and fast rule for determining what is a reasonable notice to quit in the case of agricultural leases with annual rent reserved. Ordinarily a six month's notice ending with a year of the tenancy is necessary. But there may be cases in which the notice need not be a six month's notice and need not end with a year of the tenancy.

Circumstances relevant to the determination of what is reasonable notice in such cases.

S. Parthasarathy Iyer, for Appellant.

K. Raja Aiyar, for Respondents.

Coutts Trotter and Seshagiri Aiyar, JJ. 1917, January 23. — A. S. No. 186 of 1914.

Religious Endowments Act XX of 1863—S. 3—Temple Committee—Jurisdiction—Temple located within British territory—Particular deity in respect of which dispute exists not kept in British territory—Effect.

The fact that the particular duity in which the parties to a suit appear to be interested is not kept in British territory will not deprive the Temple Committee of its jurisdiction under S. 3 of the Religious Endowments Act XX of 1863.

M. O. Parthasarathy Iyengar and *K. P. Lakshmana Rao* for Appellants.

T. Prakasam, V. S. Narasimha Chari with him, for Respondents.

Coutts Trotter and Seshagiri Iyer, JJ. 1917, January 23. — A. S. No. 261 of 1913.

Malabar Law—Kanom—Redemption suit—Right of jenmi to interest on arrears of Purappad—Right to set off arrears and interest against Kanom and value of improvements—Absence of provision in deed for interest—Effect.

In a suit for redemption the jenmi is entitled to set off against the kanom and value of improvements all the arrears of "Purappad" due together with interest on the same even though the document does not provide for interest.

8 M. 381, foll. 29 M. L. J. 772 explained; Custom of Malabar ref. to.

C. Madhavan Nair, for Appellant.

T. R. Ramachandra Iyer, for Respondents.

Ayling and Napier, JJ.
1917, January 24. } S. A. No. 1085 of 1916.

Civil Procedure Code (Act VIII of 1859)—S. 185—Translation of English Judgment made under provisions of primary evidence of its contents—Public Document—Admissibility in evidence of certified copy of sheet containing seal of Court torn—Effect.

In a case in which a judgment written in English was, under S. 185 of Act VIII of 1859, translated into the language in ordinary use in the Court by which the judgment was delivered, and the translation was signed by the Judge *held*, that the translation was primary evidence of the contents of the judgment.

4 I. C. 579, foll.

A certified copy of a public document is admissible in evidence even though the sheet containing the seal of the Court is torn.

T. V. Venkatarama Aiyar and *R. Rajagopala Aiyar* for Appellants.

A. Krishnaswami Aiyar and *A. N. Sitarama Sastri* with him for Respondents.

Oldfield and Bakewell, JJ.
1917, January 26. } C. M. A. No. 47 of 1916.

Provincial Insolvency Act (III of 1907)—"Creditor and debtor"—Relationship of—What constitutes—Hindu Law—Father's debt—Death of father—Adjudication of undivided son for father's debt when possible—Right of father's creditor to present petition for adjudicating son an insolvent.

Where a Hindu, who had borrowed money for family purposes died without discharging the debt and leaving undivided sons and family properties and the creditor applied for the adjudi-

cation as an insolvent of the eldest of the sons alleging that he was the managing member of the family, that he had executed a nominal sale-deed in respect of the family properties with the intention of defeating his rights and that by reason of the said alienation the sons were unable to pay (the creditors) the debt from out of the family properties, and the court below dismissed the petition on the ground that the relationship of debtor and creditor did not exist between the parties within the meaning of the Provincial Insolvency Act, held, reversing the order of the court below, that the relationship in question did exist and that the application must be proceeded with.

A. S. Visvanatha Aiyar for *K. V. Krishnaswamy Aiyar* for Appellant.

K. R. Guruswami Aiyar and *A. Subbaramaiyar* for Respondents.

Oldfield and Bakewell, JJ.
1917, January 26. — C. M. A. No. 95 and 96 of 1916.

Life Insurance Policy—Suit upon—Forum—Place of death of insured different from place of contract and place where money is made payable—Effect.

A policy of Life Insurance may be sued upon at the place where the insured died, though the place where the contract was entered into and the money was made payable by the contract is different.

B. Sitarama Rao for Appellant.

Hon. T. Rangachariar and *A. V. Seshayya* for Respondents

Chief Justice and Seshagiri Aiyar, J.
1917, February 2. — A. S. No. 300 of 1914.

Limitation Act—Art. 124—Applicability—Malabar Law—Stanom—Alienation of property by Stani—Suit by his successor for recovery of property—Limitation.

A suit by a Malabar Stani for the recovery of possession of a temple and its properties from a person to whom his predecessor in stanom had alienated the trusteeship is governed by Art. 124 of the Limitation Act.

T. R. Ramachandra Aiyar, A. Nilakanta Aiyar and *P. V. Parameswara Aiyar* for the Appellants.

C. V. Anantakrishna Aiyar for Respondent.

Sadasiva Aiyar and Spencer, JJ. — *1917, February 6.* — S. A. No. 936 of 1913.

Malabar—Customary Law—Anandiravakasam tenure of perpetual duration—Forfeiture of holding—Setting up, title of third party—Effect.

According to the customary law of Malabar a person who holds of another under what is known as an Anandiravakasam tenure of perpetual duration in which there is no reservation of rent or services incurs no forfeiture by setting up the title of a third party.

C. V. Anantakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar, A. Narayanasarma and *P. V. Parameswara Aiyar* for Respondents.

Ayling and Napier, JJ. — *1917, February 6.* — S. A. No. 842 of 1915.

Limitation Act—Art. 113—Applicablity of first and second parts—Contract to be performed on a contingency Suit by third party—Beneficiary—Limitation—Starting point—Suit by other party to contract—Limitation—Starting point.

Where A entered into a contract with B to the effect that on payment by B to A of a certain sum the latter was to assign a decree in his favour to C, *held*, in a suit by C against A for the specific performance of the contract by the execution of an assignment deed, that limitation began to run from the date on which A refused to perform the Contract and not from the date on which B made the payment stipulated by the contract.

Held, that the second part of Art. 113, and not the first, applied to cases in which the person suing was not necessarily in a position to know of the occurence of the contingency contemplated by the contract.

Quaere: whether if the suit had been by B himself, the suit would still fall within the second part of Art. 113.

G. Venkataramiah for The Government Pleader V. Ramesam for Appellants.

M. Patanjali Sastri for P. Narayanamurti for Respondents.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Spencer, JJ.
1917, February, 6.

S. A. No. 1379 of 1915.

Hindu Law—Joint family—Father—Power to effect a partition by will—Minor member, if bound by arrangement—Mother not the guardian while father is alive—Gift of a small portion of family property to daughter, if valid.

A Hindu father shortly before his death executed an unregistered document styled a will under which he divided the ancestral family properties into 4 shares and allotted a share to his son by his deceased first wife, another to his minor son by his second wife, the third to his daughter and reserved the residue to be enjoyed by himself and his wife for life and thereafter by his two sons. It was found that the share allotted to the daughter was a fairly small portion of the property and that the major son by the first wife and the second wife on behalf of the minor son had consented to the arrangement, which was otherwise *bona fide* and reasonable:

Held, that the father was competent to effect the arrangement with the consent of his major son, in spite of the existence of a minor son at the date, that the consent of the mother (second wife) on behalf of the minor son was ineffectual, she having no right to the guardianship of her son during the existence of the father; and that the gift of a small portion of the family property to the daughter ought to be upheld.

Briraj Singh v. *Shedan Singh*, (1913) I. L. R. 35 A. 337; *Kamakshi Ammal* v. *Chakrapani Chettiar*, (1907) 17 M. L. J. 528; *Anivillah Sundaramaya* v. *Cherla Seethamma* (1911) 21 M. L. J. 695; *Arunachella Pillai* v. *Sampurnathachi*, (1907) 27 M. L. J. 485, Referred to.

G. S. Ramachandra Aiyar for Appellant.

T. R. Venkatarama Sastri for Respondent.

Sadasiva Aiyar and Spencer, JJ.
1917, February 6.

S. A. No. 2565 of 1913.

Civil Procedure Code, S. 99 and O. 1, R. 3—Misjoinder of parties and causes of action—Redemption suit—Third parties claiming title paramount, impleaded—Misjoinder—Reversal o Lower Court's decision on the ground of.

In a suit for redemption plaintiff impleaded the mortgagee and also another person who set up his own title to some of the items but who, the plaintiff alleged, had collusively obtained a mortgage from his mortgagee. The Lower Appellate Court reversed the decree of the first court and dismissed the suit on the ground of misjoinder of parties and causes of action.

Held, that the suit ought not to have been dismissed on that ground. In a suit for redemption and possession, the stranger claiming possession was a proper party and the case did not come within the rule laid down in *Radha Kunwar* v. *Reoti Singh* (1916) I. L. R. 38 A. 488 P. C.

C. V. Ananthakrishna Iyer for Appellant.

T. R. Ramachandra Iyer for Respondent.

Sadasiva Aiyar and Spencer, JJ.
1917, February 7. S. A. No. 2703 of 1913.

Limitation Act, S. 22—Mortgage suit—Suit by one of two joint mortgagees—Addition of other mortgagee after limitation—Effect of.

It is not competent to one of two representatives of a deceased mortgagee, not being the manager of a joint Hindu family, to institute a suit on the mortgage without joining the other as a party to the suit. If the other representative is added after the expiry of the period of limitation, the whole suit is barred and must be dismissed in its entirety.

Duri Bhagavanbi v. *Tadepatri Veeravadhanulu*, (1909) I. L. R. 33 M. 246; *Imam-ud-din* v. *Liladhar*, (1892) I. L. R. 14 A. 524, Referred to.

K. R. Rangaswami Iyengar for Appellant.

A. V. Visvanatha Sastri for *G. S. Ramachandra Aiyar* for Respondent.

Wallis, C. J.
1917, February 7. C. M. S. A. No. 123 and 124 of 1916.

Civil Procedure Code, O. 21. Rr. 2 and 11—Application for entry of satisfaction time-barred—Execution, application for—Duty of decree-holder to state satisfaction—Court if bound to take cognizance of satisfaction.

A decree-holder applied for arrest of the judgment-debtor in execution of a decree which had been satisfied more than three months before the application and the judgment-debtor also applied to have satisfaction entered up in the decree. The judgment-debtor contended that it was the duty of the decree holder under O. 21, R. 11, C. P. Code to state in his application the fact of satisfaction of decree and that his omission to do so was a fraud on the Court, which entitled it to take cognizance of the satisfaction *suo motu*. *Held*, that it was incompetent for the judgment debtor who had failed to apply for satisfaction within time, to take advantage of the decree-holder's duty to state the particulars required by O. 21, R. 11 C. P. Code and to get an in-certified adjustment indirectly recognised.

Hansa Godhaji v. *Bhawa Jagaji* (1915) I. L. R. 40 Bom. 333. *Trimbak Ramkrishna* v. *Hari Laxman* (1910) I. L. R. 34 Bom. 575 distinguished.

K. R. Gurusami Iyer and *A. Subbarama Iyer* for Appellant.

Sadasiva Iyer, and Spencer, JJ.
1917, February 12.

S. A. No. 2602 of 1914.

Transfer of Property Act, S. 59—Mortgage — Attestation, meaning of—Mortgagor must sign in the presence of attestors—Admission of execution in the pleadings—Proof of attestation, if unnecessary—Evidence Act, S. 70.

In the absence of any proof *aliunde* that the execution of a mortgage document was made in the presence of the attestors and where the attesting witness himself deposes that the mortgagor did not execute it in his presence, the document is not validly attested within the meaning of S. 59 of the T. P. Act and does not operate as a mortgage notwithstanding the admission of execution by the mortgagor in his written statement.

35 Mad. 607 P. C. foll.

V. C. Seshachari for Appellant.

S. Ranganadha Iyer for Respondent.

Oldfield and Bakewell, JJ.
1917, February 12.

C. M. S. A. No. 75 of 1916.

Limitation Act, Art. 180—Decree-holder purchaser—Application for possession—Limitation.

An application for possession by a decree-holder-purchaser is not an application to execute the decree and is governed by Art. 180 of the Lim. Act.

Sultan Sahib v. *Chidambara Chettiar* (1908) 32 Mad. 136; *Ramasamy Iyer* v. *Abdul Aziz Sahib* (1916) 19 M. L. T. 164 followed.

A. V. Visvanatha Sastri for Appellant.

T. S. Krishna Iyer for Respondent.

Sadasiva Aiyar and Spencer, JJ. 1917, February 13.	C. M. P. No. 2358 of 1916.

Civil Procedure Code—S. 110—Leave to appeal to Privy Council—Conditions—Para 1—Subject-matter of suit—Para 2—"Property"—Meaning —Claim to water-right—Valuation for purposes of S. 110—Principles—Para 3—When certificate under, will be given.

In a suit in which the plaintiffs prayed, in effect, for a declaration of their right to have the water of a channel flowing on to the lands of their village and for an injunction restraining the defendants, the ryots of a neighbouring village, from interfering with the exercise by the plaintiffs of their said right, *held*, that the "subject-matter of the suit" within the meaning of Para 1 of S. 110 of the code was the specific right claimed and the value of that right for the purposes of para 1 of S, 110 could be properly ascertained only on the basis of the detriment or injury which plaintiff would suffer if that right was negatived.

The word "property" in para 2 of S. 110 means a claim to rights in property. Para 2 itself means that the suit must involve rights or claims to property which rights and claims are worth Rs. 10,000 and upwards.

6 Bom. L. R. 403 (406) 18 W. R. 21 foll.

Where all the questions of law arising in the case were covered by several decisions and the only question was as to the applicability of the law to the particular case *held*, that the case was not one for a certificate under para 3 of S. 110 I. P. C.

2 L. W. 145 foll.

T. R. Venkatarama Sastri and M. S. Vaidyanathaiyar for Petitioners.

Government Pleader (*S. K. Parthasarathy Iyengar* with him) and *A. S. Visvanathaiyar* for Respondents.

NOTES OF RECENT CASES.

Abdur Rahim and
Srinivasa Aiyangar JJ.
1917, February 13.

A. S. No. 196 of 1914.

Hindu Law—Sanyasam—Entrance into order of, by Brahmins—Necessary ceremonies—Proof—Quantum.

A Brahmin cannot be said to have become a sanyasi in the absence of evidence to show (1) that he had undergone all the ceremonies prescribed for the purpose, especially that he had uttered the praishamantram and (2) that he had relinquished his interest in all his wordly property. The fact that he had assumed the external symbols of a Sanyasi such as dress etc., is not enough.

Hon. The Advocate-General and *S. Desikachariar* for Appellants.

T. R. Ramachandraiyar, B. Narasimha Rao, D. Appa Rao and *N. A. Krishna Aiyar* for Respondents.

Abdur Rahim and
Seshagiri Aiyar, JJ.
1917, February 19.

A. S. No. 71 of 1916.

Evidence Act, S. 35—Register of births and deaths maintained by village Reddi or Karnam—Entry as to date of death, admissible in evidence.

A Register of Births and Deaths kept by a village Karnam or Reddi in compliance with the standing orders of the Board of Revenue falls within S. 35 of the Evidence Act. An entry recording the death of a person in such a register is admissible to prove the date of his death.

T. V. Venkatarama Iyer for Appellant.

T. Prakasam for Respondent.

Wallis, C. J. and
Seshagiri Aiyar, JJ.
1917, February, 23.

L. P. A. No. 19 of 1916.

Malabar Law—Marumakatayam tarwad—Gift by uncle to his four nieces—Nature of property taken.

Where an uncle following the Marumakatayam Law made a gift of certain properties to his nieces, children of the same mother and there was nothing in the grant to show that an absolute alienable estate was intended to be conferred, *held*, that

the property was intended to be given as putravakasam property *Chakkara Kannan* v. *Kunhi Pokker* (1915) I. L. R. 39 M. 317= 29 M. L. J. 481 followed.

Judgment of *Kumaraswami Sastri, J.* in *Kayyalil Kundan Kutty* v. *Vayalpath Parkum* (1916) 32 I. C. 107 affirmed.

A. Sundaram for Appellant.

C. V. Ananthakrishna Iyer for Respondents.

Wallis, C. J. and Seshagiri Aiyar, J. 1917, February 23. — A. S. Nos. 60 to 63 and 65 of 1915.

Limitation Act, Art. 91—Undue influence—Suit to set aside transaction—Limitation—Starting point—Cessation of undue influence—Trustee—Compromise—Alienation of property—Right of beneficiary.

The starting point of limitation for a suit to set aside a document on the ground that it was executed under undue influence is the date when the undue influence ceases.

Sri Krishan Lal v. *Mt. Kashmiro* (1916) 31 M. L. J. 362 Referred to.

When a trustee enters into a compromise on behalf of the trust in pursuance of which he confirms an alienation of the trust property, the beneficiary acquires under S. 63 of the Trusts Act a cause of action to set aside the transaction.

The Hon. The Advocate-General and *K. Balasubramanya Iyer* for appellant.

G. S. Ramachandra Iyer and A. V. Visvanatha Sastri for Respondents.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917, February 23. — L. P. A. No. 147 of 1916.

Execution Sale—Boundaries and area, conflict between—What passes under sale—Intention.

Where the decree for sale of some villages in a mortgage suit comprised certain hamlets and the sale was clearly intended to include them, but the boundaries given in the application for execution and the subsequent proceedings and the sale certificate did not include them, though the description of the villages, their extent, income and peishcush all followed the description in the decree, *held* that the hamlets also passed to the auction purchaser.

In determining what was intended to be sold, where there is a conflict between the boundaries and the measurements, more importance would no doubt be attached to the boundaries. Where,

however, the boundaries are indefinite as in the case of forest tracts the measurements assume more importance. The question in every case is what was the intention of the parties.

B, Somayya for *P. Narayanamurti* for Appellant.

Hon. Mr. T. Rangachariar for Respondent.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917, February 23. — L. P. A. No. 121 of 1916.

Contract Act, S. 15—Coercion—Threat of suicide—Deed induced by, voidable.

Where a person caused his wife and son to execute a deed of release of their reversionary rights, under threat of suicide unless the deed were executed.

Held, per *Wallis, C. J. and Seshagiri Aiyar, J. (Oldfield, J. contra)* that the deed was voidable as having been brought about by coercion. It is clearly the policy of the Indian Penal Code to forbid suicide and a threat of suicide by a husband to his wife or a father to his son clearly comes within S. 15 of the Contract Act.

Per Seshagiri Aiyar, J:—"Any act forbidden by the Indian Penal Code" is much wider than "an act punishable by the Code."

M. Patanjali Sastri for *P. Narayanamurti* for Appellants.

G. Venkataramiah for Respondents.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917, February 23 — L. P. A. Nos. 197 to 200 of 1916.

Ejectment—Landlord and tenant—Lease of building sites—Erection of buildings—Silence or knowledge of landlord—Compensation.

Per Seshagiri Aiyar, J.—Neither the fact that the lease was of building sites nor the fact that the lease did not specify any period during which it was to subsist, is enough to make the tenancy permanent. Even a tenancy for building purposes is not to be presumed to be permanent, if the origin of the tenancy is known. Where a tenant is lawfully ejected by the landlord, his only right under S. 108 (h) of the Transfer of Property Act is to remove the superstructure within the period of the tenancy.

Per curiam: To entitle a tenant to compensation on the determination of the tenancy by the landlord, for the value of permanent structures erected on the land, it is necessary to show something more than the landlord simply gave permission to

build or that the landlord kept quiet being aware of the erection of structures.

Ramsden v. *Dyson* (1865) L. R. 1. E. and I. A. (H. L.) 129; *Angammal* v. *Aslami Sahib* (*1913*) I. L. R. 38 M. 710 Referred to.

The Hon. The Advocate General and *M. Purshotam Naidu* for appellant.

M. Tirunarayanachariar fo Respondent.

Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. 1917 February 23.

L. P. A. No. 175 of 1915.

Mahomedan Law—Navayats—Suit for partition among descendants of mahomedan traders—Principles applicable to—Actings of parties, effect of.

A Mahomedan belonging to the Navayat community set up a trading business in 1818 and later on, a younger brother of his joined him in managing the concern. In 1845 the entire property of the trading business was described as that of the elder brother and the younger was declared entitled to an eighth share. Subsequently however the brothers went on living and trading together without specific division of assets or profits and equally enjoying the properties purchased in the name of either. In a suit for partition in 1910, by the descendants of the two brothers.

Held, that the properties must be treated as if they belonged to the two brothers as equal owners and a partition effected on that basis.

Ordinarily when a Mahomedan trader dies leaving descendants who live and continue to trade jointly, the properties are held by them in common in accordance with the shares to which they would be entitled under the Mahomedan Law. Having regard to the fact that the parties were *Navayats* and to the long course of actings and conduct of the parties, the same considerations applied to the case as would govern the business of Hindu family firms.

Khatija v. *Ismail* (1889) I. L. R. 12 M. 380 Ref.
Mahomed Musa v. *Aghore Kumar Gangali* (1915) I. L, R. 42 C. 801 P. C.

B. Sitarama Row for Appellant.

J. L Rozario and *H. Balakrishna Row* for Respondent

NOTES OF RECENT CASES.

Ayling and Napier, JJ.
1917 February, 23.
S. A. No. 828 of 1915.

Trust—Co-trustees—Suit by some to set aside alienation by the rest, if maintainable.

Where five of the trustees of a Devaswam sued to set aside a lease granted by the sixth without consulting the latter before the institution of the suit, *Held,* that the suit was maintainable, the necessity for consulting the other trustee being a mere formality.

K. P. M. Menon for Appellants.

C. V. Ananthakrishna Aiyar and Kutti Krishna Menon for the Respondents.

Sadasiva Aiyar and Spencer, JJ.
1917, February 26.
L. P. A. No. 222 of 1916.

Limitation Act, S. 12—Application for review—Time spent in obtaining copies, if may be deducted.

In an application for review the applicant is entitled, under S. 12 of the Limitation Act, to deduct the time spent in obtaining copies of the judgment and decree sought to be reviewed, from the time limited by Art. 173, though under the rules of procedure it is not necessary for him to file such copies along with the application for review and though he has not in fact so filed them.

K. Jagannatha Iyer for Appellant.

S. Ramaswami Iyer for Respondents.

Sadasiva Aiyar and Spencer, JJ.
1917, February 26.
L. P. A. No. 135 of 1916.

Letters Patent, Cl. 15— Appeal—Order refusing leave to appeal in forma pauperis, *not appealable.*

An order of a Single Judge of the High Court refusing leave to appeal *in forma pauperis* under S. 46 (3) of the Provincial Insolvency Act, is not appealable under Cl. 15 of the Letters Patent.

21 M. L. T. 77 referred to.

G. S. Ramachandra Iyer for Appellant.

L. A. Govindaraghava Iyer for Respondent.

Chief Justice and Srinivasa Aiyangar, J. 1917, March 20. — A. S. No. 201 of 1910.

Mortgage—Suit for sale—Appeal against decree dismissing—Execution of another mortgage in favour of third party during pendency of—Subsequent mortgagee added as party to appeal—Compromise between prior mortgagee and mortgagor subsequent to—Binding nature of compromise on subsequent mortgagee.

During the pendency of an appeal against a decree dismissing a suit for sale on a mortgage, the mortgagor executed another mortgage over the same property in favour of a third party who applied for being added and was added as a party to the appeal. Subsequent to the third party's being so added as a party the original mortgagee and the mortgagor effected a compromise and applied for its being made a rule of court. On objection taken by the subsequent mortgagee to the compromise being made a rule of court, *held* by the Chief Justice (Srinivasaiyangar, J., dissenting) that the compromise could be made a rule of court and that the subsequent mortgagee was bound by the compromise.

T. V. Venkataramaiyar, L. A. Govindaraghavaiyar and A. Viswanathaiyar for Appellant.

A. Krishnaswmi Aiyar, M. Govindarajulu Naidu, S. Subramaniaiyar for Respondents.

Ayling and Napier, JJ. 1917 March 21. — Cr. R. C. 680 of 1916.

Cr. Procedure Code, S. 344—Application for adjournment under—Order granting adjournment if can make applicant pay costs of day of opposite party—Case based on police report—Informant to police if and when can be ordered to pay day's costs.

A Court granting an adjournment under S. 344, Criminal Procedure Code can order the party at whose instance the adjournment is granted to pay to the opposite party the costs of the day. And when the case is based on a police report such an order can be passed against the informant to the police if he takes an active part in the conduct of the prosecution.

S. Panchapagesa Sastri for *K. S. Jayarama Aiyar* for Petitioner.

Public Prosecutor for Crown.

Chief Justice and Seshagiri Aiyar, J. 1917, March 22. — A. S. B. 99 of 15.

Mutt—Disciples—Right of—Representative suit by disciples—Suit for possession being given to Matathipathi—Alienation by Matathipathi—Limitation Act, S. 3, Arts. 134, 144.—C. P. Code, Or. 1, R. 8.

Two of the disciples of a mutt can for themselves and on behalf of the other disciples of the mutt maintain a suit for a declaration that an alienation by the matathipathi is not binding on the mutt and for a decree directing possession of the alienated properties to be given to the matadhipati for the time being who is made a party defendant to the suit.

Such a suit is governed either by Art. 134 or Art. 144 and not by Art. 120.

Per Seshagiri Iyer, J.—The disciples are persons claiming their right to sue for or through the matathipathi, within the meaning of the definition of "Plaintiff" in Sec. 3 of the Limitation Act.

Hon. Advocate-General T. Narasimha Aiyangar, Nallasivan Pillai, and *V. Raghavachari* for Appellants.

Hon. T. Rangachariar, A. Krishnasami Aiyar, C. Krishnamachariar and *S. Aravamudu Aiyangar,* for Respondents.

Seshagiri Aiyar, Bakewell, JJ. 1917, March 26. — C. M. A. No. 353 of 1913.

Limitation Act, Art. 182 (5)—Application in accordance with law—Mortgage decree for sale of mortgaged properties—No personal decree passed—Application in execution by decree-holder for payment to him of amounts in court, not comprised in the mortgage—Application dismissed—Will not save limitation for a subsequent application for sale.

Where a preliminary decree and order absolute for sale of mortgaged properties was passed in a mortgage suit and the decree-holder applied in execution for payment to him of amounts deposited by a receiver appointed over the properties of the judgment-debtor in another suit, and the application was dismissed on account of the non-payment of batta, the application is not one

in accordance with law, in the absence of a personal decree in the case, and will not save limitation for a subsequent execution application.

T. Rangachariar and *N. Rajagopalachariar* for the Appellant.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Respondent.

Seshagiri Aiyar, and Bakewell, JJ. 1917, March 27. — C. M. A. No. 115 of 1915.

Civil Procedure Code, O. 34 R. 6, Ss. 38 and 42—Suit by puisne mortgagee against mortgagor and prior mortgagee—Decree by one Court for sale of mortgaged property, giving the prior mortgagee right to execute—Decree transferred for execution to another court—Application for personal decree by the prior mortgagee defendant to the Court to which the decree is transferred.

Where puisne mortgagee instituted a suit against the mortgagor and the prior mortgagee and a decree for sale of the mortgaged properties was passed and the decree gave the prior mortgagee right to execute the decree and this decree was transferred for execution to another court, an application for personal decree cannot be made to the court to which the decree had been transferred for execution; the proper court to pass a personal decree is the court which passed the original decree. 25 Mad. 244 at p. 287 dissented from.

The prior mortgagee, though a defendant can apply for a personal decree under O. 34 R. 6.

T. Rangachariar and *N. Rajagopalachariar* for the Appellant.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Respondent.

NOTES OF RECENT CASES.

Spencer and Srinivasa Aiyangar, JJ. 1917, March 28. — L. P. A. No. 215 of 1916.

Decree—Suit to set aside—Jurisdiction—Fraudulent compromise decree of District Court—Decree for sum less than Rs. 2,500, though suit for larger amount—Suit for setting aside decree if entertainable by District Munsif's Court—Effect of Munsif setting aside decree—Trial of suit in District Court.

A District Munsif's Court has jurisdiction to entertain a suit for the setting aside on the ground of fraud of a compromise decree of a District Court if the decree was for an amount below Rs. 2,500, though the suit in which it was passed was for a larger amount and if the Munsifs' Court is otherwise competent to entertain the suit. The effect of the Munsif setting aside the compromise is to restore the parties to their original rights and on a proper application being made to the District Court, that Court must continue the trial of the suit which resulted in the compromise decree.

N. A. Krishna Aiyar for Appellant.

N. S. Rangaswami Aiyangar for *T. Narasimha Ayyangar* for Respondent.

Abdur Rahim and Srinivasaiyangar, JJ. 1917, March 29. — A. S. No. 398 of 1914.

Mortgage—Prior and subsequent mortgages—Prior mortgagee's suit without making subsequent mortgagee party and purchase by him in execution of decree therein—Subsequent mortgagee's suit against prior mortgagee for sale or for redemption—Terms of decree for redemption.

In a suit for sale or for redemption brought by a puisne mortgagee against a prior mortgagee who had sued on his mortgage without making the plaintiff a party to the suit and himself purchased the property in execution of the decree therein, *held* that the terms on which redemption should be decreed were that plaintiff should pay defendant the interest. One on his mortgage amount at the contract rate up to the date of redemption while defendant should account for the profits of the mortgaged property up to the said date.

M. D. Devadoss, T. V. Gopalaswami Mudaliar and *A. Ganesh Aiyar* for Appellant.

K. Bashyam Aiyangar and *A. Krishnaswami Aiyar* (*S. Aravamudu Aiyangar with him*) for Respondent.

Seshagiri Aiyar, and Bakewell, JJ.
1917, March 29.

S. A. No. 1862 of 1915.

Hindu Law—Joint Family—Wife of member of—Property standing in name—Presumption as to ownership of.

There is no presumption that property purchased in the name of the wife of a member of a joint Hindu family is joint family property. The onus of proving that it is, lies on the person setting up such a case.

8 M. 214, followed.

P. Somasundaram for Appellant.

B. Narasimha Rao for Respondent.

Abdur Rahim and Napier, JJ.
1917 April 3.

S. A. 1291 of 1915.

Hindu Law—Dancing girls—Succession—Principles governing—Degradation, effect of—Maternal grandmother's father's brother's daughter—Maternal grandmother's father's brother's daughter's son—Preferential heir.

Members of the dancing girl community are Hindus. The male members are governed by the Hindu Law. The law applicable to females is the ordinary Hindu Law of Succession and not the special rules governing stridhanam succession. Dancing girls are neither virgins nor married women and they never become widows so as to attract the special rules of succession applicable to the latter under the Hindu Law. Among dancing girls natural relationship is not destroyed by prostitution or degradation. In the absence of any special usage, succession among dancing women is traced as among males under the ordinary Hindu Law.

Among dancing girls as between a maternal grandmother's father's brother's daughter and a maternal grandmother's father's brother's daughter's son, the former is the preferable heir.

K. S. Ganesa Iyer for Appellant.

T. S. Ramasami Iyer for Respondent.

NOTES OF RECENT CASES.

Chief Justice and Oldfield, J.
1917, March 28.

O. S. 38 of 1916.

Registration Act, Ss. 17, 49—Agreement to lease—Registration—Necessity—Admissibility without registration in suit for specific performance or in the alternative for damages.

In a suit for specific performance of an agreement to grant a lease or in the alternative for damages, *held*, that an unregistered agreement to grant the lease was inadmissible in evidence for any purpose whatsoever.

35 M. 63 (F. B.) followed.

C. V. Anantakrishnaiyar and P. V. Ramachandra Raju for Appellant.

V. V. Srinivasaiyangar, S. Ponnuswami Aiyar, K. Narayanaswami Aiyar and *Md. Ibrahim Saheb* for Respondents.

Spencer and Srinivasa Aiyangar, JJ.
1917, March 28.

C. M. A. No. 335 of 1916.

C. P. Code, O. 21 R. 99—Application under—Dismissal as being too late—Suit under O. 21 R. 103—Limitation—Suit not barred though instituted more than a year after date of order.

Where an application under O. 21 R. 99, C. P. C. is dismissed without investigation on the ground of late presentation, *held* a suit under O. 21 R. 103 is not barred though instituted more than a year after the date of the order.

B. Somayya for Appellant.

S. Varadachariar for Respondent.

Ayling and Sadasiva Aiyar, JJ.
1917, April 3.

A. S. No. 277 of 1915.

Contract—Construction—Time of essence of contract—Test—Contract to sell immoveable property—Period fixed for completion of contract and provision for forfeiture of Vendor's rights in event of default on his part—Effect.

Where a contract to sell immoveable property fixed a period for the completion thereof and for the execution of the conveyance and provided that, in the event of default on the part of the vendee to perform his part of the contract within the period fixed, his rights in the contract should not be enforced and he should forfeit his deposit, *held*, on the construction of the contract, that there was an express stipulation making time the essence of the contract.

K. V. Krishnaswami Aiyar for Appellant.

S. Subramaniya Aiyar for Respondent.

Ayling and Sadasiva Aiyar, JJ.
1917, April 3.

C. M. A. 234 of 1913.

Civil Procedure Code, Or. 3 R. 4—Minor litigant—Vakil for—Minor attaining majority—Effect on appointment—Termination of appointment—Or. 32 R. 3 (4)—Minor defendant—Appointment of guardian for—Appointment without notice to minor—Effect.

The appointment of a pleader for a minor litigant continues in force even after the minor attains majority unless terminated under one or other of the circumstances specified in Or. 3 R. 4 of the Code.

Omission to issue notice to the minor as required by Or. 32 R. 3 (4) of the Code is a mere irregularity and does not vitiate the proceedings in which the guardian is appointed without such notice.

L. A. Govindaragavaiyar, for Appellant.

T. V. Venkatarama Aiyar, S. Varadachariar, R. Rajagopala Aiyar, for Respondent.

NOTES OF RECENT CASES.

Seshagiri Aiyar and Kumaraswami Sastri, JJ.
1917, April 4.

S. A. No. 1224 of 1916.

*Mortgage deed—Construction—Deed of usufructuary mortgage for term with personal covenant—Provision in deed for mortgage working itself out as sale in default of payment on due date and for transfer of patta to mortgagee—Validity—Clog on equity of redemption—*Bona fide *improvements by mortgagee after transfer of patta—Right to value of improvements—T. P. Act, S. 51—Execution of decree—Attachment of property in—Claim to property by person holding it adversely to judgment-debtor—Claim allowed and suit by decree-holder—*12 *years period expiring between date of claim and date of decree-holder's suit—Effect—suit if continuation of claim proceedings—claimant's right to property.*

In execution of a decree certain property was attached as belonging to the judgment-debtor but on a claim preferred by a person who had held the property adversely to the judgment-debtor, though for less than the prescriptive period, the claim was allowed and the attachment raised. Thereupon the decree-holder instituted a suit under O. 21 R. 63 for declaration that the property belonged to the judgment-debtor. The claimant resisted the suit on the ground that prior to the date of its institution his prescriptive title to the property had become perfected. *Held*, over-ruling the plea, that inasmuch as the claimant had himself invoked the assistance of the Court by preferring the claim and the suit was merely a continuation of the claim proceedings, the status quo ante continued during the pendency of both, the claimant was bound by the ultimate decision therein, and the running of the prescriptive period stopped from the date of his claim.

11 M. L. J. 344 not followed.

35 B. 79 followed.

Where a usufructuary mortgage for a term contained a personal covenant and a provision that if the mortgage amount was not paid by the due date the mortgagee was to enjoy the mortgaged property absolutely as having been purchased by himself for the said amount and that the mortgagor would present Razinama for issue of patta in the name of the mortgagee in respect of the said property, *held* that the mortgage was not an anomalous mortgage and that the provision for the mortgagee becoming absolute owner was a mere clog on the equity of redemption,

Where in the above case patta was transferred to the name of the mortgagee and subsequent to the transfer, the mortgage effected improvements on the property believing himself to be absolute owner thereof, *held* that he was entitled to the value of such improvements under S. 51 of the Transfer of Property Act.

M. D. Devadoss for Appellant.

A. Krishnaswami Aiyar for Respondent.

Abdur Rahim, J.
Napier, J.
1917, April 12.
C.M.P. No. 460, 461 and 922 of 1917.

Civil Procedure Code, O. 45, r. 15—Application for transmission of the Privy Council decree with a printed copy of the decree, but not certified—Original decree miscarried—Whether High Court can order transmission of decree on the copy—Practice—Costs—Decree of High Court directing each party to bear his costs—Pleaders not filing certificate of fees within a week of the decision—Decree of the Privy Council allowing the appeal with costs of the successful party throughout—Fees certificate in the appeal to the High Court presented with the application for transmission of decree—Whether registrar can include fees in the costs.

Where the decree of His Majesty in Council certified in the office of the Privy Council could not be produced with the application for transmission of the Privy Council decree for execution, as the same had been sent by the Solicitor in England to a wrong address and miscarried, it is competent to pass the order of transmission of the decree under O. 45 r. 15 C. P. C., on an uncertified copy of the decree printed by His Majesty's printers.

The principle of *Hurrish Chunder* v. *Kali Sundari,* 9 Cal., p. 482 followed.

Where the High Court by its decree each party to bear his own costs and consequently the pleaders failed to put in a certificate of fees within a week of the disposal of the appeal by the High Court and on appeal to the Privy Council, the appeal was allowed with the costs of the successful party throughout and he filed the fees certificate in the appeal to the High Court, after the decision of the Privy Council along with his application for transmission of the decree for execution, it is competent to the Registrar to include the fees in the costs, though the certificate was filed after 7 days of the High Court's decision.

C. A. Seshagiri Sastri for the Petitioners.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for the Respondent.

NOTES OF RECENT CASES.

Spencer and Srinivasa Aiyangar, JJ. 1917, April 11. — C. M. P. Nos. 717 and 983 of 1917.

Charity—Scheme—Appointment of fresh trustee—No provision in decree—Vacancy—Remedy by fresh suit.

Where the High Court framed a scheme for the management of a charity in the mofussil and appointed a trustee but there was no provision in the decree empowering the Court to fill up any vacancy in the office or enabling the parties to apply for directions,

Held that a vacancy in the office of trustee could not be filled up on an application by the parties but that the remedy lay in a fresh suit under S. 92, C. P. Code.

T. Narasimha Iyengar, T. Arumainatham Pillai and A. V. Visvanatha Sastri for petitioners.

K. V. Krishnaswami Iyer and S. Visvanatha Iyer for respondents.

Abdur Rahim and Srinivasaiyangar, JJ. 1917, April 12. — A. S. No. 181 of 1915.

Madras Irrigation Cess Act, S. 1—Water Cess—Imposition—Legality—Inamdar owning both banks of river and not taking more than accustomed quantity of water—Government owning one of the banks Rights of—S. 2 (1)—Effect—Government water mingling with Inamdar's—Effect—Engagement to supply water free of charge—Scope of —Use of water for irrigation of lands lying waste at time of settlement —Liability to levy of cess.

An Inamdar who owns both banks of a river and does not take more than the accustomed quantity of water of the river for the irrigation of lands in excess of the mamool wet is not liable to the imposition of water cess under S. 1 of the Madras Irrigation Cess Act. He is the owner of the river.

Per Abdur Rahim, J.—Even in cases in which Government owns one of the banks, the other being owned by an Inamdar, its rights are just those of any other riparian owner.

S. 2 (1) of the Act does not declare as a rule of law the ownership of Government in all standing and flowing water nor does it shift the onus of proof of ownership on to the Inamdar. The mere fact that a small quantity of water belonging to Government mingles with water of a river belonging to an Inamdar does not entitle Government to levy water cess. To entitle Government to do so the quantity must be substantial.

Where at the time of the Inam Settlement Government undertakes to supply free of charge water used in storing up certain tanks, the engagement is not confined to the then extent of the mamool wet and the Inamdar is entitled to use the water free of charge for irrigating lands which were waste at the time of the settlement.

Hon. Advocate General (*K. Balasubramaniya Iyer with him*) for Appellant.

Hon. T. Rangachariar and S. Muthia Mudaliar for Respondent.

Chief Justice, Oldfield and Kumaraswami Sastri, JJ. *1917 April, 17.*	Full Bench. Cr. R. C. No. 544 of 1916.

Christian Marriage Act (XV of 1872)—Applicability—S. 68—Marriage between persons one of whom a Christian—Celebration according to Hindu mode — Hindu performing marriage if guilty of offence under S. 68.

A Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under S. 68 of the Christian Marriage Act.

The Act was intended to apply to marriages of all Christians including marriages in which one of the parties alone is a Christian.

"Solemnising marriage", meaning of.

Public Prosecutor for the Crown.

T. R. Ramachandra Aiyar (amicus curiæ) for Accused.

M. D. Devadoss for Complainant.

Chief Justice Abdur Rahim, Coutts Trotter, Seshagiri Aiyar and Srinivasa Aiyangar, JJ. *1917, April 23.*	Full Bench. S. A. No. 2558 of 1912.

Limitation Act, Art. 134—Applicability—Mortgage under which possession is taken by mortgagee subsequent to date thereof—Limitation in suit to recover property from him—Starting point—Date of transfer or date of possession.

Per Chief Justice and Coutts Trotter, J.:—Art. 134 applies to a transfer by way of mortgage under which possession is taken

by the mortgagee subsequent to the date thereof. In a suit to recover property from the mortgagee in such a case limitation under the article runs from the date of transfer and not from the date on which possession is taken by the mortgagee.

Per Abdur Rahim and Seshagiri Aiyar, JJ.—Art. 134 applies to such a case but limitation under the article runs from the date on which the mortgagee takes possession under his mortgage and not from the date thereof.

Per Srinivasa Aiyangar, J.—Art. 134 does not apply to such a case, but, if it does, limitation runs from the date of the mortgage and not from the date on which the mortgagee takes possession under the mortgage.

K. P. M. Menon for Appellants.

A. Sundaram for Respondent.

Wallis C. J. Oldfield and Kumarasami Sastri, JJ.
1917, April 20.

Full Bench.
S. A. No. 1693 of 1914.

Mortgage—Release of some items of mortgaged property—Right of mortgagee to proceed against the remaining items for the entire debt.

Even in a case where the mortgaged properties have been conveyed away by the mortgagor to stranger purchasers it is open to the mortgagor to release some items of the mortgaged property and to proceed against the remainder for the entire mortgage amount.

S. Panchapagesa Sastri, for *K. R. Rangaswami Iyengar* for Appellant.

K. S. Jayaram Iyer, for *T. Arumainatham Pillai* for Respondent.

Spencer and Srinivasa Iyengar, JJ.
1917, April 24.

C. M. A. No. 137 of 1916.

Provincial Insolvency Act, S. 46 (4)—Time for appeal—Time spent in obtaining copies of judgment of Court below, if can be deducted—Limitation Act, S. 12.

Their Lordships referred to the Full Bench the question whether in calculating the time prescribed for filing an appeal under S. 46 of the Provincial Insolvency Act, the appellant is entitled to deduct the time spent by him in obtaining certified copies of the judgment appealed from.

C. A. Seshagiri Sastri for Appellant.

Dr. S. Swaminathan for Respondent.

Ayling and Sadasiva Aiyar, JJ.
1917, April 25.

A. S. No. 44 of 1916.

Religious Endowments Act, Ss. 14 and 18—Suit instituted by four persons with leave—Death of one pendente lite—Suit if abates.

A suit instituted under S. 14 of the Religious Endowments Act by four persons with leave under S. 18 of the Act, does not abate by the death of one of the plaintiffs during the pendency of the suit.

38 Mad. 1192; 29 M. L. J. 231, distinguished.

40 Mad. 110 referred to.

G. S. Ramachandra Iyer for Appellants.

A. Krishnasami Iyer for Respondents.

Spencer and Srinivasa Iyengar, JJ.
1917, April 25.

C. M. S. A. No. 40 to 42 of 1916.

Execution Sale—Confirmation—Agreement to set aside on payment of decree amount into court—Deposit by strangers—Sale not set aside—Decree-holder not entitled to deposit.

Certain immoveable properties were sold in execution of a decree and purchased by the decree-holder and the sale was also confirmed. Thereafter the judgment-debtor entered into a compromise with the decree-holder whereby the sale was to be set aside on payment by the former into court of the decree amount within a certain time. Certain strangers who contracted with the judgment-debtor for the private purchase of the properties on the setting aside of the sale, deposited several sums of money into court on behalf of the judgment-debtor. The sale, however, was not set aside owing to the moneys not having been deposited within time. *Held* that the deposits continued to be the property of the strangers and the decree-holder was not entitled to draw them out towards the portion of the decree left unsatisfied by the proceeds of the court sale.

13 C. W. N. 100 followed.

K. V. Krishnasami Iyer and *P. V. Parameswara Iyer* for Appellant.

M. Patanjali Sastri for Respondent.